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No. _____

In The

Supreme Court of the United States

DUBAY ENTERPRISES d/b/a CHATEAU THEATER,

Petitioner,

vs.

CITY OF NORTH CHARLESTON BOARD OF ZONING ADJUSTMENT and WILLIAM GORE, in his official capacity as Zoning Administrator,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment to the Constitution of the United States prohibit a municipality from improperly employing unbridled discretion to zone out a lawful, properly located, pre-existing adult business without due process?

2. Do the Fifth and Fourteenth Amendments to the Constitution of the United States require that a lawfully situated adult business be afforded minimal procedural and substantive due process to respond to a municipality's zoning challenge?

3. Does the Fifth Amendment to the United States Constitution prohibit a municipality from offering irrelevant, inflammatory evidence at an administrative hearing to persuade a Board of Zoning Appeals to shut down a lawfully existing adult business?

LIST OF PARTIES TO THE PROCEEDING

All the parties to the proceeding are set forth fully in the caption.

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Board of Zoning Appeals Order entered January 4, 1999

Circuit Court Order entered March 24, 1999

Dubay d/b/a Chateau v. William Gore in his official capacity as Zoning Administrator and the City of North Charleston, (unpublished opinion No. 2001-MO-047) on July 26, 2001, amended opinion filed September 18, 2001, to which the Petitioner timely applied for rehearing.

The Supreme Court denied the application, but it did issue an amended, unpublished opinion on September 18, 2001, to which the Chateau timely applied for a rehearing as allowed by state appellate rules. The South Carolina Supreme Court denied the Petition for Rehearing on October 10, 2001, making the Petition to this Court due on or before Tuesday, January 8, 2002.

This petition for writ of certiorari followed.

BASIS FOR JURISDICTION

The South Carolina Supreme Court in this case entered the final opinion on September 18, 2001 (App. p. 1). Thereafter the Appellant petitioned for a rehearing as allowed by the South Carolina Appellate Rules. The Supreme Court entered a final order denying the petition for rehearing on October 10, 2001 (App. p. 62), which would make this petition for certiorari due in the Supreme Court on or before Tuesday, January 8, 2002, pursuant to Rule 13 of the Rules of the Supreme

Court. This Court has authority to review the opinion of the South Carolina Supreme Court pursuant to Rule 10(b) and (c) of the Rules of the Supreme Court, and Title 28, § 1257, U.S.C.A.

In the matter herein, the Supreme Court of South Carolina has issued an unpublished opinion that is in direct conflict with the Court's numerous holdings regarding the protection afforded to free speech under the First Amendment and the right of parties to procedural and substantive due process under the Fifth and Fourteenth Amendments. Perhaps one of the best known cases on right to due process is *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), which struck down a claim and delivery (replevin) action for failure to provide reasonable notice to the defendant. In the present matter, the South Carolina Supreme Court ignored the facts in the record that the Chateau conforms to all applicable city zoning requirements. In upholding the City's attempt to force the Chateau, a lawful adult business, to cease operations, the South Carolina Supreme Court found that while the Zoning Administrator's notice to the Chateau was deficient, it was still "minimally sufficient," (App. p. 16) because it found, contrary to the evidence, that the Chateau can be disqualified from operation by its proximity to a church or a residence, so that particular identification of the alleged disqualifier is not necessary. The South Carolina Supreme Court also erroneously shifted the burden of proof from the City's requirement to prove the Chateau's nonconformity and shifted the burden to the Chateau proving conformity. Even more egregious is the South Carolina Supreme Court's refusal to address, despite Petitioner's request in its appeal and its application for rehearing, the indisputable fact that the

City deliberately attempted to prejudice the Board by adducing testimony from five out of its seven witnesses to the implication of homosexual activity on the Chateau's premises. While such testimony may be relevant in a nuisance suit, it was not only irrelevant in a straight forward zoning action, but also the repetition of the irrelevant and inflammatory testimony clearly and improperly deprived the Chateau of a meaningful or fair hearing. The Supreme Court of South Carolina's opinion refused to address this ground and cannot be allowed to stand, as it deprives a lawfully operated, properly zoned adult business of its constitutionally protected, fundamental rights of free speech, equal protection, and due process.

CONSTITUTIONAL PROVISIONS INVOLVED

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. Amendment I, United States Constitution.

No person shall be . . . deprived of life liberty, or property, without due process of law; . . . Amendment V, United States Constitution.

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

protection of the laws. Amendment XIV, Section 1, United States Constitution.

FACTS AND PROCEDURAL HISTORY

The Chateau Theater has operated initially in the County of Charleston and, after annexation, in the City of North Charleston in excess of thirty-five years. It is located in a heavy industrial zone ("M-1"), which is the area designated for adult business by the City's zoning ordinance. In 1992, the City of North Charleston annexed The Chateau into the City as a legally situated, conforming use.

While the City of North Charleston had a sexually oriented business license ordinance, the Supreme Court of South Carolina effectively abrogated it in its opinion, *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 531 S.E.2d 518 (2000). In *Pic-a-Flick*, the Supreme Court of South Carolina struck down a substantially similar City of Columbia business license ordinance for failing to define "principle business purpose."[1] Since the North Charleston ordinance similarly fails to define "principle business purpose," it too runs afoul of the same criticism. (The South Carolina Supreme Court also struck down a Greenville County ordinance on the ground that it failed to provide "prompt judicial review." See *Harkins v. Greenville County*, 304 S.C. 606, 533 S.E.2d 886 (2000). The North

[1] In South Carolina, municipalities require proper zoning as a condition of licensing. Therefore, "zoning" and "licensing" are practically indistinguishable.

Charleston ordinance also fails to comport with the holding in *Harkins*.) As a result, the City of North Charleston may only regulate adult businesses through zoning.

In 1998, the Zoning Administrator for the City of North Charleston demanded that the Chateau close, claiming it violated the zoning ordinance but failing to provide any specifics as to what was not in compliance. This notice read in applicable part: "Our Sexually Oriented Business Ordinance provides that the building in which such a use is housed must be separated from nearby residentially zoned areas and from Church property by at least 1000 feet in distance. Our measurements indicate that your business establishment is within 1000 feet of Unity Church of Charleston and residential properties along Whitney Drive." (App. p. 2) The Petitioner's request for classification of the issues was refused by the City. (App. p. 114-115) However, as demonstrated by the City's own tax records (App. p. 113), the Chateau preexisted the creation of the Unity Church of Charleston, so that entity, by definition, could not be a disqualifier under the ordinance. (The ordinance provides that the subsequent location of a church within 1000 feet does not act as a disqualification. App. p. 103) As such, the Chateau repeatedly requested clarification from the City as to how it ran afoul of the ordinance's spatial separation. Despite these repeated pleas, the City refused to provide any additional specifics on what it alleged was nonconforming. The Chateau appealed to the North Charleston Board of Zoning Appeals for reversal of the City's vague demand for it to cease business. Under South Carolina law, the Board of Zoning Appeals operates as a quasi-judicial Board, which receives evidence and issues

a decision. During the hearing before the Board, the City devoted five sevenths (or 71%) of its case on its contention that unconventional activity occurred on the premises even though the limited notice provided to the Chateau gave no indication that nuisance was a factor. The Board, which is the Chateau's sole opportunity to present evidence and present its case, received this cumulative testimony over vigorous objection by the Chateau as to its patent unfairness. The City of North Charleston's Board of Zoning Appeals does not consist of any neutral and detached judicial officer to hear objections to evidence and make rulings. In fact, to comprehend the unfairness to the Chateau even further, the same office bringing the prosecution also represents the Board of Zoning Appeals and advises the Board on the propriety of receiving evidence.

After a hearing in which the Chateau still had no notice of the particulars of the alleged zoning violation, and during which the Board received the above-mentioned irrelevant and inflammatory testimony, the Board rubber-stamped the City's demand that the Chateau cease operation, refusing even to consider the possibility of a variance. Thereafter the Chateau timely appealed to the Court of Common Pleas, and on March 24, 1999, the Court of Common Pleas affirmed the decision of the Board of Zoning Appeals. The Chateau then timely appealed to the Supreme Court of South Carolina, which issued an amended unpublished opinion on September 18, 2001, and subsequently denied the Petitioner's application for rehearing on October 10, 2001. The South Carolina Supreme Court found that while the City's notice to

the Chateau was suspect, it was "minimally sufficient" (App. p. 16) and refused to address the Chateau's objection to the introduction of repetitive, inflammatory and irrelevant testimony. That Court also ignored the fact that the Chateau not only pre-existed the creation of the Unity Church and therefore under the City's own ordinance, could not be disqualified by such, but also ignored the fact that North Charleston annexed the Chateau and the surrounding industrial area into the City as a lawfully situated adult business. In fact, the Supreme Court of South Carolina reversed the burden of proof in such matters, by relieving the City of its obligation to prove the Chateau was non-conforming and placing that obligation upon Chateau.

This petition for Writ of Certiorari followed.

ARGUMENT

QUESTION 1

Does the First Amendment to the Constitution of the United States prohibit a municipality from improperly employing unbridled discretion to zone out a lawful, properly located, pre-existing adult business without due process?

The principle raised by this appeal is almost identical to the issue raised in this Court's recent opinion, *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). There, Justice Kennedy, writing for the majority, summed up the Court's review of constitutional limitations placed on the states' power to regulate wetlands as follows: "The State may not put so potent a Hobbesian

stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions." *Palazzolo* at page 2462.

Precisely so. Even though the present case involves the suppression of protected adult speech rather than use of wetlands, here, the City, in exercising its zoning police power, uses that power as an Hobbesian stick to destroy and trample the petitioner's fundamental First, Fifth and Fourteenth Amendment rights. The treatment of the Chateau below is scandalous and is akin to rationalizing a lynching by saying the condemned man was guilty anyway. The record below demonstrates that not only did the Petitioner not receive minimal due process or equal protection, but also the City actively prevented the petitioner from understanding the charges against it, and controlled the reception of evidence by representing the very Board making a decision thereby crippling the Chateau's ability to prepare for the only hearing it is afforded or have a fair hearing. Each of these elements will be discussed in detail below.

The Chateau does not dispute that the City has the ability to enact reasonable spatial separation as an allowable means to combat the "secondary effects" of adult businesses. In exercising this power, the City has adopted the following spatial separation requirements for an adult business:

1. It must be in an industrial zone.
2. It must be 1000 feet from a church, unless the adult business pre-existed the Church.
3. It must be 1000 feet from a lot line "devoted" to residential use unless it pre-existed the use.

4. It must be a mile away from a school or park. (City of North Charleston Ordinance 4-14, enacted in 1992, App. p. 89).

The Supreme Court declined to address the one-mile separation,[2] and the City never sought to have the Court do so. Therefore, that ground is abandoned by the City and will not be addressed here.

The City admits the Chateau is in an industrial zone. The City's tax records demonstrate that the Chateau was in existence before the Unity Church (App. p. 113), and therefore, under its own ordinance, the Unity Church cannot disqualify the Chateau. Therefore, the only possible disqualifying separation requirement is the alleged lack of distance is to a lot line "devoted" to residential use. However, the City's official zoning map reveals that it is measuring to a lot line of a "B-2" zone, which is not residential (large, oversized exhibit filed with the South Carolina Supreme Court), and moreover, the record in this case is completely silent as to whether the Chateau did or did not precede the "residential area along Whitney Drive." Even though the South Carolina Supreme Court completely reversed the universal rule of burden of proof on this issue,[3] the evidence demonstrates

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[2] "Furthermore, we have not considered the Chateau's proximity to a school in arriving at our decision, thus we need not decide the constitutionality of that portion of the ordinance." (App. p. 16)

[3] "A municipality seeking to enjoin a violation of a zoning ordinance has the burden of proving that a nonconforming use did not exist at the time of the adoption of the ordinance, or that a nonconforming use was abandoned." *C.J.S.*, "Zoning and Planning," Section 346.

that the line utilized by the City to disqualify the Chateau is a "B-2" line, not a line "devoted" to residential use as required by the ordinance as may be seen by reference to the official zoning map of the City of North Charleston. (Currently this large, oversized map is on file with the South Carolina Supreme Court.)

To avoid these shortcomings, the City devoted a large part of its argument below to its contention that the City has the right under this Court's holdings in *City of Renton v. Playtime Theatres*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) and *Lakewood v. Plain Dealer Publishing Co*, 486 U.S. 785, 108 S.Ct. 2144, 100 L.Ed.2d 771 (1988) to regulate adult businesses by enacting reasonable spatial separation. The Chateau never contended otherwise. The Chateau does contest the City's use of this power to require the Chateau to cease business when it is in the proper zone and cannot be disqualified by a subsequent location of a church within 1000 feet. The parties disagree about the measurements to the Unity Church, but such measurements are irrelevant because the Chateau existed first.[4] As Justice Kennedy noted in *Palazzolo*, just because the state possesses the power to regulate lawful first amendment activity does not mean it can do so with impunity. There must be some limitation on the state's police power, and the present case represents the legitimate power of zoning carried to an extreme so as to be transformed into the type of unconstitutional "Hobbesian stick" rejected by this Court in *Palazzolo*.

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[4] While the exact distance is irrelevant, the City claims the Chateau is 945 feet from an empty lot owned by the Unity Church; the Chateau claims the distance is 975 feet.

In affirming the trial court's finding that the Chateau must cease doing business, the Supreme Court of South Carolina declined to address the one-mile separation from a school or park requirement, and therefore the Chateau is not precluded from operating on that ground. Instead, the South Carolina Supreme Court agreed with the trial court that the one thousand foot rule disqualified the Chateau from the Church *or* the residential lot line, without defining which one was the basis of its determination. This alone is an essential error on both factual and legal grounds. As noted above, the Chateau cannot be disqualified on the basis of any spatial separation to the Unity Church, as the Chateau pre-existed that Church. There is no proof in the record that the Chateau, either when it was in the incorporated area prior to an annexation or after annexation, did not pre-exist the residences on Whitney Drive. Further, the Chateau had no meaningful opportunity to address the alleged residences as the City refused to reveal, prior to the hearing, the point to which it was measuring in that area. Thus, while the Supreme Court of South Carolina criticized the notice afforded to the Chateau, it erroneously concluded it was "minimally sufficient," (App. p. 16) because the Court mistakenly believed the Chateau is disqualified from operation by violation of the spatial separation from a church or residential lot line (App. p. 15). The Court's conclusion as to how the City met due process requirements is constitutionally inadequate and runs in complete contrast to this Court's repeated pronouncements on the need for due process. Furthermore, the South Carolina Supreme Court further eroded due process and inexplicably allowed the burden of proof to be shifted to the Chateau to prove that it did conform with the spatial requirements and was not pre-

existing to the alleged disqualifiers – without even identifying same – rather than requiring the City to show it did not.

These important federal questions involved in this case were raised from the inception of the case as demonstrated in the original pleadings to the Board itself (App. p. 76) and the circuit court (App. pps. 65-75.) At the only evidentiary hearing afforded to the Chateau, that of the quasi-judicial Board of Zoning Appeals on October 29, 1998, the Chairman of the Board, rebuked counsel for attempting to state the position of the Chateau with the following: "Sir, we're not going to discuss the Constitution here." (Hearing before Board of Zoning Appeals, App. p. 87). Because of the lack of notice, the vagueness of the basis of the South Carolina Supreme Court's decision that the Chateau violated some spatial requirement, though not specifically which one or where, and because of its affirmation of the inflammatory, irrelevant testimony, the decision below has the chilling effect of allowing a lawful business to be extinguished simply because of the message it disseminates notwithstanding that an adult message is permitted by the law, the Court should grant Petitioner's application for certiorari. The discriminatory treatment of the Petitioner below is precisely the type of discrimination this Court sought to prevent in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), in which this Court stated that the government has a heavy burden when seeking to limit, or in this case end, the dissemination of lawful, adult speech.

It is impossible to look at what happened to the Chateau in this instance and conclude anything other than, because it disseminates adult speech, the South Carolina Supreme Court has approved the City's willful

trampling of the Chateau's fundamental rights to notice and a fair opportunity to be heard. The Chateau is singled out for salient discriminatory treatment precisely because of what it is and what it does. The very purpose of the Constitution to the United States is to protect minority viewpoints from the majority, or, as Thomas Hobbes characterized it, the absolute of the Leviathan state. Here the Chateau, all its rights eviscerated and trampled, has been destroyed for no other reason than it is politically unpopular.

Question 2

Do the Fifth and Fourteenth Amendments to the Constitution of the United States require that a lawfully situated adult business be afforded minimal procedural and substantive due process to respond to a municipality's zoning challenge?

While the argument above is premised upon the undisputed protection afforded to lawful adult speech by the First Amendment, and premised further on Petitioner's argument that the attack upon the First Amendment is by depriving the Chateau of any meaningful procedural due process, the Petitioner also seeks a review of the unpublished opinion of the South Supreme Court on substantive due process and equal protection grounds as well.[5] While this question (and its answer) is necessarily similar to the analysis in Question 1, some separate,

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[5] The South Carolina Supreme Court avoided the challenge on substantive due process and equal protection by holding that the Chateau could apply for a variance: "Nothing in this

brief mention is justified on the additional grounds of substantial due process and equal protection.

In its unpublished opinion, The Supreme Court of South Carolina held that the Chateau was less than a thousand feet from a church *or* line devoted to a residential use and therefore disqualified under one or the other of the North Charleston zoning ordinance. The Supreme Court provided further, that since the Chateau has always been situated in the correct zoning classification, it was therefore free to seek a variance from the strict application of the zoning provisions on the basis of hardship.

The difficulty with the Court's analysis below is that not only does it fail to provide substantive due process to the Chateau because of the vagueness of the methodology employed by the City, but also, it singles the Chateau out for special treatment because of the message it provides. While there is no direct United States Supreme Court case directly on this point, the Northern District of Ohio District Court examined a similar statute in that state and found it constitutionally lacking. In *Cleveland's P.M. on the Boardwalk v. City of Cleveland,* Case No. 1:92CV1412, slip op., the Court found that in cases where the city of Cleveland decided to prevent a certain establishment from locating in a particular area, it could choose to measure the distance requirement from property line to property line. However, if the city wanted to allow a different establishment to locate in the exact same area, it could achieve this result merely by altering the method of

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opinion should be construed to prevent the Chateau from applying to the Board for a variance in the future." (App. p. 16).

measurement, such as measuring a direct line from building to building or by measuring the ordinary route of pedestrian travel. Ultimately, the court concluded that the lack of any standard for measuring the five hundred-foot distance requirement would result in arbitrary and discriminatory application of this requirement, and would render persons of ordinary intelligence completely unable to discern where adult establishments could lawfully be located. *Id.*, slip op. at 7-09 16-17. While the factual issue in *Cleveland's P.M.* is not precisely the same as in the instant case; nonetheless, the reasoning of the Court in Ohio is applicable here where not only was the City of North Charleston's own statutory exclusion for pre-existing businesses ignored, but the petitioner was intentionally left in the dark as to what the true issues were. The "hearing" before the quasi-judicial Board of Zoning Appeals was nothing more than a show trial with a pre-determined outcome, presided over by the very office bringing the prosecution.

In the present case, the Chateau finds itself singled out for unique treatment. No business other than adult businesses, are subjected to such ambiguous measurement rules or such haphazard application of its ordinance. Furthermore, the City absolutely refused to divulge either its measurement or even its direction. Because the Chateau is politically unpopular, the City left it to grope in the dark. When the Chateau did arrive for its one opportunity for a hearing, the City spent the majority of the night presenting allegations intended to be inflammatory about which the Chateau had no notice and was therefore unprepared to address. Additionally,

the inflammatory allegations were totally irrelevant to the hearing.[6]

During its one and only opportunity for a hearing, counsel for the Chateau requested that the Board apply its own "powers and duties" to the facts and consider a variance. Because the outcome was foreordained, the Board simply refused to consider one without further explanation. While an ordinary citizen is entitled to consideration of a variance as part of the "Powers and Duties of the Board of Zoning Appeals," the Board denied the Chateau this opportunity. In fact, because the Chateau does provide lawful adult material, it found itself in a through-the-looking-glass court, tried by the very office bringing the allegations, with no neutral or detached magistrate to act as an impartial arbiter of rules. The full record below demonstrates that the Chateau was singled out for special treatment because of what it is and what it does and not afforded the same protection afforded to any other citizen of North Charleston.

Question 3

Does the Fifth Amendment to the United States Constitution prohibit a municipality from offering irrelevant, inflammatory evidence at an administrative hearing to persuade a Board of Zoning Appeals to shut down a lawfully existing adult business?

The Petitioner's argument on this point is contained in its appeal premised upon the Fifth and Fourteenth

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[6] Even at oral argument before the South Carolina Supreme Court, counsel for the City denied the case was about constitutional issues but rather about "protecting children."

Amendments to the Constitution; however, as the full record below demonstrates, the Chateau was so blind-sided and unfairly prejudiced by the allegations of homosexual activity prominently placed into the only evidentiary hearing afforded it that this argument deserves brief individual treatment. The City admits that the issues below were issues of spatial separation. As the full record below also demonstrates, the Chateau never contested that it was a business disseminating adult speech.[7] Despite pleading with the City from the outset to define the issues so that it could be prepared to meet the allegations, instead, the City called seven witnesses, five

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[7] At the hearing before the Board, the following colloquy occurred between counsel for the Chateau and the Board Chairman:

> MR. GOLDSTEIN: Let me see if I can make this a shorter meeting. The Chateau Theatre is a sexually oriented business. There's no dispute about that. That's never been contested by anyone. . . .
>
> THE CHAIRMAN: Sir, we're not going to discuss the constitution here. Whether or not people can sell or read X-rated or pornography is not the issue before us. The issue before us is whether or not it's a sexually – oriented business and does it fall within our zoning ordinances. Does it meet all the requirements of our zoning ordinance? That's the only thing we're going to rule on. We're not going to rule on anything else. So I understand where you're going and what you're doing, but I'm just telling you what we're going to do.
>
> MR. GOLDSTEIN: Let me just state for the record that the only thing we're prepared to address are the matters set forth in Mr. Gore's letter, which is the document upon which we relied in bringing this matter before this board. (App. p. 86).

of whom were undercover officers who testified about the specter of homosexual sex.[8]

The Chateau is either entitled to a fair hearing or it is not. Since the City agrees with the Petitioner that it is entitled to a fair hearing, then the question becomes: Is spending 71% of its case on irrelevant and inflammatory evidence a violation of the Petitioner's right to fundamental fairness? It is one thing to allow a piece of irrelevant and unfairly prejudicial testimony to enter a hearing, but this case transforms the orderly administration of justice in that the City's prosecution of the Chateau involved almost nothing but an entire case of cumulative, irrelevant, and highly inflammatory allegations. Thus, this case requires the attention of this Court because the Supreme Court of South Carolina simply refused to address the issue despite being specifically asked to do so.

Like most states, South Carolina has rules of evidence that prohibit the introduction of irrelevant testimony. (See S.C. Rules of Evidence, Rules 401, 402, and 403, which are identical to the Federal Rules of Evidence.) Even assuming that one witness was necessary to prove the Chateau disseminated adult material, it is inexcusable to offer five out of seven witnesses, all of whom testified over the vigorous objection of Petitioner's counsel, to paint the Chateau with the canard of homosexual activity before a Board of laypersons represented by the same

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[8] Interestingly, not one of the officers testified he called his observations to any employee of the Chateau, and not one could state that any employee of the Chateau was aware of any alleged improper conduct. Furthermore, they made no arrests.

office bringing the prosecution. It is equally inexcusable for the South Carolina Supreme Court to refuse to address the issue, especially when our Supreme Court has, until the present case, been highly protective of a defendant's right to a fair trial, free from the taint of raw prejudice. In *Toyota of Florence v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994), the South Carolina Supreme Court remanded a case for trial when plaintiff's counsel made use of a chart during closing argument. The chart contained roughly drawn figures depicting oriental faces in combination with a mushroom cloud. The South Carolina Supreme Court found such pandering to perceived racial stereotyping so offensive as to require a new trial even though counsel failed to object to the chart: " . . . even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice. [internal citations omitted] We can hardly conceive of a more outrageous argument than that made here." In fact, the Court does not have to conceive of "a more outrageous argument" because one is presented by this very case, which makes our Court's refusal to address the issue all the more egregious.

Either the Chateau is afforded a meaningful hearing or not. If this Court grants certiorari to review the record below, then it will have the opportunity to reaffirm its long history of requiring the states to provide meaningful, minimal fairness for those citizens faced with municipal, administrative hearings. This Court has a long, distinguished history of protecting its citizens faced with the loss of property or liberty without fundamental fairness. Even a student suspended from school is entitled to

fundamental fairness; see *Goss v. Lopez*, 419 U.S. 565, 95, S.Ct. 729, 42 L.Ed.2d 725 (1975), and the cases requiring substantial protection for First Amendment challenges are too numerous to list. The Petitioner respectfully requests this Court to do so; that is, to allow the Petitioner an opportunity to address legal issues raised by the City in a meaningful fashion, free from the taint of irrelevant slander.

CONCLUSION

There is no question that adult bookstores and theaters are politically unpopular, and they are often, as in the present case, denied basic constitutional protections solely because of the message they disseminate. However, an essential purpose of the First Amendment to the Constitution is to afford a specific measure of protection to speech. Essential purposes of the Fifth and Fourteenth Amendments are to provide a minimum measure of protection to citizens against arbitrary governmental action and to insure that all citizens are treated fairly. As Alex de Toqueville observed in 1835, in *Democracy in America*, the majority viewpoint requires no constitutional protection. The strength of the Constitution is that it protects the rights of the minority against a powerful majority. The Supreme Court should grant certiorari in this case to articulate the minimum standards necessary to make municipal, quasi-judicial hearings provide the fundamental fairness guaranteed by the Constitution. The South Carolina Supreme Court clearly failed to give voice to the constitutional protections for the minority view, and it

allowed the rights of an unpopular applicant to be trampled. As the record below demonstrates, the Chateau did not receive a fair hearing. As counsel for the City argues, the landowner's *only* opportunity to have an evidentiary hearing is before the Board of Zoning Appeals. It thus becomes vitally important for the Court to take this case to establish the minimum requirements for quasi-judicial hearings. Without some measure of fairness, any appearance before any Board of Zoning Appeals is an exercise in futility. This Court is, of course, the court of last resort, and while its caseload is unbearably heavy, it should grant the Petitioner's application for review to undo this suppression of the lawful expression of unpopular messages. Otherwise, this Court allows its imprimatur to be stamped upon the misuse of the state's legitimate power of zoning as nothing more than the pretext to suppress unpopular speech. To protect the rights of free speech, the Court should grant the application of the Petitioner herein.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Dubay Enterprises,
d/b/a Chateau Theater, Appellant,

v.

City of North
Charleston Board of
Zoning Adjustment and
William Gore, in his
official capacity as
Zoning Administrator, Respondents.

Appeal From Charleston County
Gerald C. Smoak, Sr., Circuit Court Judge

Memorandum Opinion No. 2001-MO-047
Heard January 23, 2001 – Refiled September 18, 2001

AFFIRMED

Thomas R. Goldstein, of Belk, Cobb, Infinger & Goldstein, P.A., of Charleston, and H. Louis Sirkin and Laura A. Abrams, of Sirkin, Pinales, Mezibov & Schwartz, of Cincinnati, Ohio, for appellant.
J. Brady Hair and Derk B.K. Van Raalte, IV, of North Charleston, for respondents.

JUSTICE PLEICONES: This is an appeal from the circuit court which affirmed the City of North Charleston Board of Zoning Adjustment's ("Board") decision to close

the Chateau Theater ("Chateau") because the theater violated the City of North Charleston's ("City") zoning ordinance. The order also declares the ordinance constitutional. We affirm.

FACTS/PROCEDURE

The Chateau is a sexually oriented business[1] as that term is defined by the City's zoning ordinance, North Charleston, S.C., Code § 4-14 (1990). On June 16, 1998, the City's zoning administrator notified the Chateau's owner by letter that the Chateau was located "within 1000 feet of Unity Church of Charleston and residential properties along Whitney Drive," and was therefore in violation of certain spatial requirements contained in the ordinance. The letter advised the Chateau that it must come into compliance within one month or cease operations.

In a letter dated June 25, 1998, counsel for the Chateau replied to the zoning administrator's letter asking for clarification regarding specific measurements and denying knowledge of any violations.

On August 12, 1998, the deputy city attorney sent a letter to the Chateau's attorney stating that "[m]easurements indicate the Chateau to be impermissibly located within 1,000 feet of church or residential property" and that the building apparently violated "several interior design requirements of the ordinance." This letter also advised of the City's zoning appeal process. The Chateau again asked for clarification of the charges in a letter

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[1] Appellant does not contest this classification of the Chateau.

dated August 26, 1998. Similar correspondence followed; however, the City never honored the Chateau's request for clarification of the charges leveled against it.

The Chateau appealed the zoning administrator's decision to the Board and a hearing was held on October 29, 1998.

At the hearing, the Chateau called only one witness, Heston Dubay, owner of the Chateau. Mr. Dubay testified that the Chateau had been operating in the same location for nearly 30 years. He testified that, prior to the June 16 letter from the zoning administrator, he received no notice from the City that the Chateau was in violation of the zoning ordinance. He further testified that the Chateau was located at most 975 feet from the lot line of a church on Leeds Avenue.

A surveyor testified for the City that, according to his measurements, the Chateau was less than 1000 feet from the lot line of a church, less than 1000 feet from a residential lot, and 1141.80 feet from a ball field located on school property. Five police officers testified to the interior layout of the Chateau, as well as to various disturbing events they had witnessed at the Chateau. Finally, the zoning administrator testified that the Chateau was impermissibly close to Fellowship Presbyterian Church, a residential lot, and "property owned by or . . . used as a school property." The zoning administrator further asserted that the Chateau's interior design did not conform with the ordinance because one could not see inside the private viewing rooms from the cash register. Chateau's counsel objected throughout the proceeding that

much of the evidence was irrelevant. Counsel also complained that the Chateau lacked notice of the matters under consideration.

The Board found the Chateau violated the zoning ordinance, and affirmed the decision of the zoning administrator. The Chateau then filed an appeal in the Court of Common Pleas challenging the Board's decision on a number of grounds. This action was combined with a declaratory judgment action challenging the constitutionality of the ordinance. The circuit court affirmed the Board's decision and found the ordinance constitutional. The Chateau appealed.

THE APPEAL

The Chateau raises a number of exceptions in its brief. We address these issues below.

ANALYSIS

I. Notice

The Chateau contends it was denied due process when the Board heard and considered evidence of zoning violations of which the Chateau had insufficient notice. We disagree.

The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except *on due notice* and an opportunity to be heard. . . . " S.C. CONST. art. I, § 22 (emphasis added).

The United States Supreme Court has declared that the Due Process Clause[2] requires "notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, 873 (1950). A demonstration of substantial prejudice is required to establish a violation of due process rights. *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987).

The zoning administrator informed the Chateau in the June 16 letter that its building was "within 1000 feet of Unity Church of Charleston[3] and residential properties along Whitney Drive," and therefore, in violation of the zoning ordinance. The administrator did not identify the "residential properties along Whitney Drive" to which he believed the Chateau was impermissibly close. When the Chateau requested the specific measurements upon which the zoning administrator relied in determining the violations, the response came from the deputy city attorney. In his letter, the attorney did not clarify the violations alluded to in the zoning administrator's letter,

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[2] U.S. CONST. amend. XIV, § 1.

[3] At the Board hearing, the evidence presented by the City pertained to the Chateau's proximity to Fellowship Presbyterian Church and not to Unity Church of Charleston. Despite this misnomer, the Chateau does not contend it was confused regarding the identity of the church, and admitted at oral argument that it had knowledge of the church in question.

rather he purported to establish additional zoning violations against the Chateau.[4]

The initial determination whether a zoning violation has occurred is vested in the zoning administrator; it is not within the deputy city attorney's province to add to the grounds upon which the zoning administrator relied. The attorney's letter failed to give the Chateau notice that the zoning administrator would rely on other grounds at the Board hearing. Further, the response to the Chateau's request for specific measurements was insufficient to give "due notice" as to all allegations leveled against the Chateau.

However, to reverse the decision below because of insufficient notice, we would have to conclude that the City provided insufficient notice as to all alleged violations. In other words, we must find that the Chateau was not sufficiently notified of any violations. This we cannot do.

The June 16 letter from the zoning administrator reasonably apprised the Chateau that its proximity to a church ran afoul of the ordinance and afforded the Chateau an opportunity to present a defense to this charge. The Chateau cannot claim it lacked notice regarding its proximity to a church where its owner independently measured the distance between the church and the business. The owner took photographs of undergrowth and a

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[4] This letter informed the Chateau that "[m]easurements indicate the Chateau to be impermissibly located within 1,000 feet of church *or* residential use" and that "it would appear that the Chateau violates *several* interior design requirements of the ordinance." (Emphasis added).

drainage ditch separating the church from the business and presented these photos at the Board hearing. The Chateau conceded at oral argument that it could identify the church referred to in the June 16 letter, notwithstanding the misidentification contained in that letter.[5] Given these facts, we find that the Chateau had adequate notice of this violation.

Having found that the City sufficiently notified the Chateau that its proximity to a church violated the ordinance, we address the Chateau's defenses to that violation.

II. Amortization unreasonable

The Chateau contends that the fact it is located less than 1000 feet from a church, a clear *prima facie* violation of the ordinance, should not mandate the business' closure because the Chateau predated the church in question. The Chateau further maintains that this violation should be excused because the Chateau pre-dated the ordinance's enactment and because the property was annexed into North Charleston after the City enacted the ordinance. Distilled to its essence, the Chateau's argument is that the moment for determining whether the Chateau conformed with the applicable land-use laws was on the date it commenced doing business, and not on the date it was annexed into the City.

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[5] Additionally, in its complaint, appellant alleges that the City failed to provide it with adequate notice of the zoning violations charged "other than the alleged set back requirements separating the appellant and a building allegedly used as a church."

The City, on the other hand, maintains that the time to determine the Chateau property's conformity with the ordinance is not the date the business opened for business, but the date the property was annexed. Further, the City contends that any uses which did not conform with the ordinance on the date of annexation could be amortized out of existence. We agree.

Courts facing similar questions have held that annexed property is subject to the zoning laws of the annexing municipality, despite the fact that the nonconforming use pre-dated annexation. *See, e.g., White v. Dallas,* 517 S.W.2d 344 (Tex. Civ. App. 1974) (city could discontinue nonconforming use even though use existed at the time city annexed the property where amortization scheme provided reasonable time for owner to recoup investment); *Long Island Univ. v. Tappan,* 113 N.Y. S.2d 795 (N.Y. Sup. Ct. 1952) (owner of annexed property must abide by all valid ordinances of annexing village). *See also* Annotation, *What Zoning Regulations are Applicable to Territory Annexed to a Municipality,* 41 A.L.R. 2d 1463 (1955) ("It appears to be generally accepted that the annexation of property to a municipal corporation is an act of the state, and such property stands thereafter subject to the same burdens and entitled to the same benefits as any other property within the corporation, all contracts and ordinances of the municipality being extended to the newly added property, in the absence of contrary provision."). *Cf. Duke Power Co. v. Blue Ridge Elec. Membership Corp.,* 117 S.E.2d 812 (N.C. 1961) (municipal corporations are permitted to enlarge their corporate limits; when so enlarged, the annexed territory and its citizens are subject

to all ordinances and regulations in force in the municipality).

We are not persuaded by the Chateau's argument that property annexed into a municipality after enactment of an otherwise valid zoning scheme should be treated differently from property within the city limits at the time the zoning ordinance is enacted. Adoption of such a rule would deprive a municipality of the ability to regulate land use. The Chateau's arguments predicated on the fact that its business predates the church's genesis, the City's enactment of the ordinance, and the property's annexation into the City are irrelevant.[6]

This Court has previously confirmed the validity of amortization schemes as a means of effectively dealing with non-conforming uses which have deleterious secondary effects on the community at-large.

> An amortization provision is valid if reasonable. Reasonableness is determined by '[b]alancing the public gain against the private loss.' The burden is upon the petitioner to prove the unreasonableness of the amortization period. The period is presumed valid unless the petitioner demonstrates its loss outweighs the public gain.

Bugsy's, Inc. v. Myrtle Beach, 340 S.C. 87, 97-98, 530 S.E.2d 890, 895 (2000) (citations omitted).

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[6] There is no dispute that the business pre-dated enactment of the ordinance and the City's annexation of the property. However, the Chateau presented no evidence at the Board hearing that it, in fact, pre-dated the church. On appeal to the circuit court, attorneys for the City conceded that the Chateau may have pre-dated the church.

The evidence in the record indicates that the City did not initiate enforcement action against the business until four years after the amortization period had lapsed. During this period, according to the Chateau's witness, the business's gross revenues were approximately $400,000 per year. The City annexed the property in 1992. The zoning ordinance contained a two-year amortization period, allowing non-conforming uses to continue in operation for an additional two years. The Chateau's two years would have expired at some time in 1994. The City did not attempt to enforce the ordinance until 1998. Instead of the two years provided for in the zoning ordinance, the Chateau had six years to recoup its investment and come into compliance, or relocate. Because it failed to establish that its loss outweighed any public gain resulting from enforcement of the zoning ordinance, the Chateau has not met its burden of showing the amortization scheme is unreasonable.

III. Estoppel

The Chateau makes the additional argument that because the City waited until 1998 to enforce the zoning ordinance, the City is now estopped from doing so. In support of this argument, it cites *Landing Dev. Corp. v. Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985).

In that case, we identified the elements of estoppel as "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) the action based thereon was of such a character as to change prejudicially

the position of the party claiming the estoppel." *Id.* at 219, 329 S.E.2d at 424.

Applying these elements, we concluded that the City of Myrtle Beach was estopped from enforcing its zoning ordinance banning short-term property rentals against condominium owners where the city's agent had affirmatively represented to the owners that such rentals were permissible under the ordinance. Additionally, the city issued business licenses to the owners permitting such rentals. The owners had spent considerable sums of money in reliance on the city's conduct and representations. We also found the ordinance ambiguous. Under these circumstances, we held that "[t]o allow the City to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon a reassessment of the meaning of an undefined term in the ordinance would be unconscionable." *Id.* at 221, 329 S.E.2d at 426.

The Chateau asserts that the facts of the instant dispute supporting estoppel are even stronger than those in *Landing Development*. We do not agree. Here, the City has not affirmatively represented that the Chateau was in compliance with the zoning ordinance. The Chateau presented no evidence of any extraordinary monetary investments in the business. The only fact identified in *Landing Development* as determinative which also applies in this case is the issuance of a 'standard' business license[7] to the

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[7] According to the zoning administrator, the Chateau has never been issued an adult business permit. Apparently adult businesses are required by the City to have both a 'standard' business license and a special adult business permit.

Chateau. This fact alone is not sufficient to estop the City from enforcing the zoning ordinance here. We affirm the trial court's determination of this issue.

THE DECLARATORY JUDGMENT ACTION

I. Prompt judicial review

The Chateau contends the ordinance is unconstitutional on its face because it fails to provide prompt judicial review of a denial of a license.[8] We disagree.

Ordinances, like other legislative enactments, are presumed constitutional; their unconstitutionality must be proven beyond a reasonable doubt. *Rothschild v. Richland County Bd. of Adjustment*, 309 S.C. 194, 420 S.E.2d 853 (1992).

Our review of the United States Supreme Court cases cited by the Chateau in support of its argument reveals that these cases deal with prior restraints on speech through denials of licenses necessary for dissemination of protected speech. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (prior restraint which fails to place limits on the time within which to decide on issuance of license is impermissible; licensing scheme created possibility that speech would be suppressed indefinitely, and failed to provide avenue for prompt judicial review so as to minimize suppression of

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[8] The City has not denied the Chateau a business license. To the contrary, at the time oral arguments were heard, the business continued to operate.

speech in case of license denial); *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988) (delay in licensing procedure compelled suppression of speech during such delay); *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (even where prompt judicial review is assured, licensing schemes lacking concrete standards to guide the licensing authority are unconstitutional); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969) (law subjecting the exercise of First Amendment freedoms to prior restraint of a license, without narrow, objective standards to guide the licensing authority, is unconstitutional).

The Chateau has not been denied a business license – it complains about the application and enforcement of the zoning scheme. No prior restraints on its free speech rights have been imposed.

This is not a situation where a business has invested money and then must wait while the government decides to approve or disapprove a business license. The Chateau's business has continued, uninterrupted. Thus, the rationale underlying the United States Supreme Court's decisions condemning prior restraint of speech does not apply to the facts of this case. Therefore, we affirm the trial court's determination of this issue.

II. Administrator's unbridled discretion/vagueness

The Chateau asserts that the ordinance is unconstitutionally vague and grants the zoning administrator unbridled discretion to declare a business non-conforming. It complains that because the terms 'devoted' and

'one mile separation' are not defined,[9] the ordinance operates entirely at the whim of the zoning administrator. We disagree.

In *Centaur, Inc. v. Richland County*, 301 S.C. 374, 392 S.E.2d 165 (1990), we addressed a similar challenge to a licensing provision contained in a zoning ordinance. The property owner claimed the licensing ordinance vested the zoning administrator with "unfettered discretion" to deny a license. We disagreed, finding that the ordinance "provide[d] the Administrator with a standard 'susceptible of objective measurement,' thus adequately circumscribing his discretion." *Id.* at 380, 392 S.E.2d at 169.

"One mile separation" is a term "susceptible of objective measurement," particularly in light of the section of the ordinance which dictates how such measurements are to be taken. *See* North Charleston, S.C., Code § 4-14(1)(6) (1990).

In construing a statute, words must be given their plain and ordinary meaning. *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996). We find that the word "devoted," as used in the ordinance to proscribe proximity to a lot "devoted to residential use," is clear and does not render

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[9] The ordinance provides, in part, that

> A person commits a misdemeanor if he operates . . . a sexually oriented business within one thousand feet of . . . the property line of a lot devoted to residential use.
>
> A person commits a misdemeanor if he operates . . . a sexually oriented business within one mile of a public or private elementary or secondary school.

North Charleston, S.C., Code § 4-14 (1990).

the ordinance vague or vest the zoning administrator with "unbridled discretion." Webster's New College Dictionary defines "devote" as "to set apart for a special use or service; dedicate. . . . " Giving the word "devoted" its plain and ordinary meaning, the ordinance does not give the zoning administrator unbridled discretion.

The Chateau has not shown beyond a reasonable doubt that the ordinance is unconstitutionally vague or that it vests the zoning administrator with unbridled discretion in enforcing the ordinance. Therefore, we affirm the circuit court's determination on this issue.[10]

CONCLUSION

Because the City adequately notified the Chateau of at least one of the zoning violations the business was alleged to have committed, we affirm the circuit court's order affirming the decision of the Board.[11] The City's

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[10] Further, this Court in reaching its decision has not relied on the Chateau's proximity to a residence or to a school.

[11] We decline to address the Chateau's contention that the Board should have *sua sponte* considered and granted a variance at the appeal hearing. The circuit court's order did not address the variance issue, except to note that the Chateau had failed to make an application for a variance. The Chateau failed to make a Rule 59(e), SCRCP, motion to amend. An appellate court cannot address an issue unless it was raised to, and ruled upon by the circuit court. *Ransom v. South Carolina Water Resources Comm'n*, 321 S.C. 211, 467 S.E.2d 463 (Ct. App. 1996). *See also United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992) (where circuit court did not explicitly rule on issue and party did not make Rule 59(e), SCRCP, motion to amend for a ruling, appellate court need not

procedure for providing notice was, however, less than ideal, and at best, minimally sufficient.

Because the Chateau has not shown, beyond a reasonable doubt, that the zoning ordinance is unconstitutional, we affirm the circuit court's determination upholding the ordinance's constitutional validity. We do not address the Chateau's contention that the ordinance's proscription of adult oriented businesses within one mile of school property is unconstitutionally broad since the order of the circuit court did not address this issue and the Chateau made no motion to amend the order pursuant to SCRCP 59 (e). Furthermore, we have not considered the Chateau's proximity to a school in arriving at our decision, thus we need not decide the constitutionality of that portion of the ordinance. *See Arnold v. Association of Citadel Men*, 337 S.C. 265, 523 S.E.2d 757 (1999) (this Court will decline to rule on constitutional questions unless the determination is essential to the disposition of a case).

TOAL, C.J., MOORE, WALLER, and BURNETT, JJ., concur.

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consider the issue). Nothing in this opinion should be construed to prevent the Chateau from applying to the Board for a variance in the future.

IN THE CITY OF NORTH CHARLESTON
THE ZONING BOARD

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	
IN RE:	)	ORDER
CHATEAU THEATRE, Appellant, -versus- CITY OF NORTH CHARLESTON, Respondent.	)	

The Chateau Theatre has appealed the decision of the Zoning Administrator of the City of North Charleston challenging the Administrator's determination that the Chateau Theatre was in violation of § 4-14 of the North Charleston Code of Zoning ordinances.

I.

PROCEDURAL HISTORY

Zoning Administrator Gore, by letter dated June 16, 1998, put the Chateau Theatre (hereinafter Chateau), on notice that they were in violation of the Sexually Oriented Business Ordinance of the City of North Charleston, and ordered that the Chateau come into compliance within one (1) month or close.

By letter dated August 30, 1998, Henry A. Dubay, President of The Chateau, Inc., appealed the decision of

the Zoning Administrator to the Board of Zoning Appeals, alleging the following grounds:

1. Mr. Gore's letter of June 16, 1998, did not apply to the Chateau as the business is properly located in an industrial zone,

2. The definition of a "sexually oriented business" as set forth in Article IV, § 4-14 of the Zoning Regulations of the Code of Ordinances of the City of North Charleston, South Carolina, is unconstitutionally vague and overbroad on its face and as applied and, therefore, it violates the 1st, 5th, and 14th Amendments to the Constitution of the United States and the companion provisions of the South Carolina Constitution. Specifically the definition:

    a. Gives unbridled discretion to the Zoning Administrator,

    b. Violates the "Equal Protection" clause of the 5th and 14th Amendments to the Constitution of the United States and the companion provisions of the South Carolina Constitution,

3. The Zoning Ordinance fails to serve a substantial governmental purpose,

4. The Zoning Ordinance literally zones out adult (sexually) oriented business from the City of North Charleston, and

5. The Zoning Administrator refused to define in what particulars the Chateau Allegedly violated the Zoning Ordinance.

The Board of Zoning Appeals convened on Thursday, October 29, 1998, to consider the issues raised by the appeal. David Bowers, Chairman of the Board of Zoning Appeals, presided with members Alfred Harrison, George Gomes, E. Lindsay Blanks, and Anna Montgomery in attendance. Also present were Diane Greer, Clerk of Counsel, J. Brady Hair and Derk B.K. Van Raalte, IV, Legal Counsel for the City of North Charleston, Thomas R. Goldstein and Michael R. Daniel, attorneys for the Chateau, and Dale L. DuTremble, serving as Legal Counsel to the Board of Zoning Appeals.

After hearing testimony, reviewing evidence, and hearing arguments of counsel, a Motion was made by Alfred Harrison to deny the appeal of the Chateau and affirm the determination of the Zoning Administrator that the Chateau is a sexually oriented business in violation of the North Charleston City Ordinance § 4-14 and that the Chateau should discontinue its activities at the specified location immediately.

II.

FINDINGS OF FACT

The Board of Zoning Appeals makes the following findings of fact:

1. Prior to presenting his case counsel for the Chateau objected to the North Charleston City Prosecutor acting as legal advisor to the Board. The Chairman ruled that Mr. DuTremble could only advise the Chairman on specific points of law and would not be allowed to question witnesses. The Board concludes that this issue is governed by the

Rules of Professional Conduct, Rule 407, SCAR, Rule 1.8. The Commentary to Rule 1.8 makes it clear that there is no prohibition against one lawyer from prosecuting an administrative matter in which another lawyer in the same office serves as the advisor to the hearing body, as long as the lawyers do not communicate with one another or share information about the case. The record is totally devoid of any allegations of improper communication, and as will be addressed infra, the Chairman only sought legal advice on two matters during the hearing.

2. As counsel for the Chateau, Mr. Goldstein also objected that the City had violated § 1-23-320 of the Administrative Procedures Act. The Board concludes that § 1-23-320 has no applicability to the hearing held by the Board of Zoning Appeals, and is specifically limited to contested cases being heard by **State** boards, commissions, departments, or officers. A "contested case" is restricted to a proceeding in which the legal rights, duties, or privileges are required by law to be determined by a State agency after a hearing. The Board of Zoning Appeals is not a State agency, board or commission, therefore § 1-23-320 has no applicability to a determination as to whether the Chateau violated § 4-14 of the Zoning Ordinances.

3. Mr. Goldstein further objected that he was only prepared to address the issue of spatial separation required by § 4-14 of the Zoning Ordinances, and that the issue of whether the Chateau violated the sexually oriented

business provisions of § 4-14 was not properly before the Board. As will be discussed, infra, the Board concludes that the Chateau was on notice of the issues to be heard by the Board and further concludes that both Mr. Goldstein and Mr. Dubay stipulated that the Chateau was a sexually oriented business.

4. Mr. Heston Dubay testified that he is co-owner of the Chateau, which has been in business for approximately 30 years. He was unaware that the Chateau had been annexed into the City of North Charleston until he received Mr. Gore's letter of June 16, 1998. He did, however, acknowledge receiving tax bills from and paying business license fees to, the City of North Charleston for the past several years. Mr. Dubay testified that he lives in Maryland[1] and had made 5 visits to the Chateau in 4 years. He was unaware of any sexual activity taking place at the Chateau and stated he was opposed to such activity, relying on his managers to oversee the operation of the business. Mr. Dubay testified that **by his own measurements** it was 945 feet from the Chateau to the closest point of the 30 foot drainage easement of the church in question[2] and 975 feet from the

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[1] The Chairman asked for and received advice from Mr. DuTremble as to the propriety of asking Mr. Dubay for his address.

[2] The church is referred to as the Unity Church of Charleston in Mr. Gore's letter of June 16, 1998; on Respondent's Exhibit 8 it is depicted as Fellowship Presbyterian Church. In any event, it is obvious to the Board that the Chateau is within

Chateau to the farthest side of said easement. Mr. Dubay testified that the City's measurements were made from the side of the Chateau that does not contain any adult material, and offered into evidence a diagram of the floor plan of the Chateau. He did agree that the Chateau is a sexually oriented business. He testified that until he received Zoning Administrator Gore's letter of June 16, 1998, he had no knowledge of any zoning violations by the Chateau and identified correspondence relating to the allegations of non-compliance. Mr. Dubay claimed to have no knowledge that the Chateau violated the spatial separation requirement from a school and was the only witness called by Mr. Goldstein on behalf of the Chateau.

5. Albert Heatly testified he has been employed by Davis & Floyd for the past 34 years and is the survey manager in the civil design department. He was qualified as an expert and testified that he had prepared a survey of the area surrounding the Chateau. Mr. Heatly identified "Point A" on his survey, which is the closest point of the church property to the Chateau, and testified it was 937.86 feet from "Point A" to the nearest wall of the Chateau. Mr. Heatly identified "Point B" on his survey, which is the southwest property corner of a residential lot, and testified it was 907.84 feet from "Point B" to the closest wall of the Chateau. Mr. Heatly

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is within 1000 feet of the church in question, no matter what name is used.

identified "Point C" on his survey, which is another existing corner of the same residential lot, and testified that it was 923.27 feet from "Point C" to the nearest corner of the Chateau. Mr. Heatly identified "Point D" on his survey, which is located at a corner of the Brentwood Elementary School property, and testified that it was 1141.80 feet from "Point D" to the nearest corner of the Chateau. Mr. Heatly testified that he did not measure from the church building itself to the Chateau[3], and that the church itself would be more that 1000 feet from the Chateau. Mr. Goldstein objected to any testimony concerning Brentwood Middle School on the ground of lack of notice[4].

6. A detective assigned to the North Charleston Police Department Narcotics and Vice Unit testified that he visited the Chateau on July 16, 1998 and found no items for sale that were not sexually oriented. He described the interior layout of the Chateau, described the coin-operated viewing booths located at the rear of the building, and described a circular hole that had been cut

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[3] § 4-14 (1)(6) mandates that measurements shall be in a straight line from the nearest portion of a sexually oriented business to the nearest property line of a church, school, or residential lot.

[4] Mr. Heatley's survey contains an insert in the top right hand corner entitled "Location Map". The insert shows the location of the Chateau, area churches and schools, as well as surrounding streets. The Board concludes that this map is as accessible to one party as it is to another and would put a reasonable person on notice of the location of schools and churches in the immediate surrounding area.

in the wall of the booth. While in the viewing booth the officer observed that an unknown person in the adjoining booth stuck his penis through the hole in the wall. The store employee behind the counter could not see into the viewing booth, the lighting was very poor, and more than one person at a time entered the viewing booths.[5]

7. A second officer assigned to the Narcotics and Vice Unit testified that he went into the Chateau on July 16, 1998, described the interior, and stated that there were no items for sale that were not sexually oriented. The officer described the viewing booths, described the circular hole cut in the wall, and described how the unknown patron in the adjoining booth thrust his penis through the hole in the wall. Upon leaving the Chateau the officer observed an unknown white male seated in a parked car in the Chateau's parking lot. This person appeared to be masturbating.

8. A third officer assigned to the Narcotics and Vice Unit testified that he went to the Chateau on July 16, 1998, described the interior of the business, and described the viewing booths. The officer described a rectangular hole cut into the wall of the viewing booth; upon looking through the hole the officer observed a white male masturbating in the

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[5] Upon advice from Mr. DuTremble, the Chairman refused to allow the City to *offer* into evidence a document prepared by this officer reflecting his observations at the Chateau on July 16, 1998.

adjoining booth. At the officer's feet he found a condom stretched out on the floor.

9. A fourth officer assigned to the Narcotics and Vice Unit testified he went to the Chateau on October 7, 1998, described the type of merchandise for sale, and identified a sexually oriented item he had purchased at the Chateau entitled the "Steve Rambo Butt & Dong Combination", priced at approximately sixty ($60.00) dollars. The officer also identified two transvestite magazines purchased at the Chateau for approximately five ($5.00) dollars. This officer also testified that he visited the Chateau again on October 28, 1998, and found it to be essentially the same as he found it on October 7, 1998, and found it to contain "similar" items for sale as he had seen on his visit of October 7, 1998.

10. A fifth officer assigned to the Narcotics and Vice Unit testified he visited the Chateau on October 7, 1998, described the interior of the business and the items for sale, and identified three (3) sexually oriented videos he purchased, all of which were marked "Chateau Theatre" inside the boxes on the videos themselves.

11. William Gore is the Zoning Administrator for the City of North Charleston. He has held this office since January of 1996. He is also the Director of Planning and Management for the City of North Charleston, which position he has held since August of 1992. He has a Bachelor's Degree in Urban Studies from Morehouse College in Atlanta, Georgia, and he has a Master's Degree in

City Planning from the Georgia Institute of Technology. He has an extensive work history in his area of expertise, having worked for the Alabama Regional Planning and Development Commission, the Tri-County Counsel of Governments as a planner, and with the City of North Charleston as a staff planner, a project manager, and his current positions of Director of Planning and Management and Zoning Administrator.

12. Mr. Gore is familiar with the location of the Chateau, which has been in the City limits of North Charleston since 1992 and is in an M-1 light industrial zoning district. Mr. Gore described the interior of the Chateau, described all the items for sale as "sexually oriented material", and described the viewing room area as being "very poorly lit". The condition of the store was the same on October 29, 1998, as it was on the prior occasions Mr. Gore had visited it. Mr. Gore was of the opinion that the Chateau was a sexually oriented business.

13. As a sexually oriented business the Chateau is governed by the provisions of § 4-14 of the Zoning Ordinances of the City of North Charleston. That ordinance contains spatial separation requirements which mandate a sexually oriented business to be at least 1000 feet from the property boundary line of any church or residence, and at least one mile from any school. Mr. Gore testified that by measuring from the nearest external wall of the Chateau to the nearest property line of the Fellowship Presbyterian Church, the

Chateau was in violation of the spatial separation requirements of § 4-14[6]. He further testified that the same measurement technique showed the Chateau to also violate spatial separation requirements for a residentially used and zoned parcel of land, as well as for Brentwood Elementary School. Mr. Gore relied upon the survey prepared by Mr. Heatly to establish the spatial separation violations. As the Zoning Administrator it is Mr. Gore's duty to determine whether a given business is in the properly zoned area. He determined that the Chateau did not meet the zoning requirements of § 4-14, but that there are other locations within the City limits that are properly zoned and properly spatially separated from churches, schools, and neighborhoods that would allow the Chateau to relocate its business.

14. Mr. Gore testified that a sexually oriented business is required to have a permit to operate as such and must pay a $500 permit fee. No such permit has been issued to the Chateau. Additionally, prior to a permit being issued the Chateau would have to submit to the City a floor plan showing the lay out of the viewing rooms, the lighting arrangement, and the line-of-view from the manager's station to all parts of the premises. No such floor plan has been provided to the City.

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[6] § 4-14 (1)(6) outlines the method of measurement to be utilized in cases such as this, which is the very method described by Mr. Gore in his testimony. Additionally, Mr. Dubay's own measurements established the Chateau's violation of the spatial separation requirements of the ordinance.

15. Mr. Gore testified that neither the church nor the residential property in question was located in a B-2 business zone and that in his personal opinion, the 1000 foot standard serves a recognized governmental interest in preventing children from being exposed to a sexually oriented business.

16. Based on the evidence presented to the Board, the exhibits introduced into evidence, and the arguments of counsel, the Board concludes that the Chateau was engaged in the sale of sexually oriented materials as one of its principal business purposes.

17. The Board further concludes that the Chateau is located in an area that violates the spatial separation requirements of § 4-14 as they pertain to a church, a school, and a residential area.

III.

CONCLUSIONS OF LAW

18. The North Charleston ordinance which deals with this appeal is § 4-14 of the City ordinances, which states that:

    (I) Location of sexually oriented business.

    (1) All sexually oriented businesses shall be located within an M-1 or M-2 zoning district. A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of an M-1 or M-2 district.

(2) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one thousand (1000) feet of:

a. A church;

b. A boundary of any residential district;

c. A public park adjacent to any residential district; or

d. The property line of a lot devoted to residential use.

(3) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one mile of a public or private elementary or secondary school.

In determining how to properly measure the 1000 foot boundary, § 4-14 mandates that:

(6) For the purpose of this section, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

19. It is the Board's determination that based upon the survey conducted by Mr. Heatly and his testimony related to the measurements and distances he found[7], coupled with the testimony of Zoning Administrator Gore, the Chateau is in violation of the spatial separation requirements of § 4-14 as applied to a church, a school, and a residential district. The fact that the Chateau is properly zoned does not insulate it from violating other provisions of § 4-14. The Chateau cannot read § 4-14 in isolation, embracing those provisions which enhance its position, while at the same time ignoring those provisions which do not. The ordinance must be construed as a whole in order to give proper effect to its mandate.

20. The Board concludes that based upon the testimony of the witnesses, the exhibits offered into evidence. and the proferred stipulation by counsel for the Chateau, the Appellant is engaged in the sale of sexually oriented materials as one of its principal, if not only, business purposes.

21. The Board further concludes that the Chateau is in violation of § 4-14 in that it is engaged in the sale of sexually oriented materials in the absence of a required sexually oriented business permit.

22. The next ground for this appeal contends that the zoning ordinance § 4-14 is unconstitutionally vague

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[7] Mr. Heatly's survey denotes a straight line measurement from the nearest portion of the Chateau building to the nearest property lines of the Fellowship Presbyterian Church, Brentwood Elementary School, and the private residence in question.

and overbroad and therefore violates the 1st, 5th, and 14th Amendments to the Constitution of the United States. The Board concludes that the definition of "sexually oriented business" contained in § 4-14 is not unconstitutionally vague. As the Supreme Court of the United States stated in *Grayned v. Rockford*, 408 U.S. 104 (1972), "condemned to the use of words, we can never expect mathematical certainty from our language". The definition of "one of its principal business purposes" contained in § 4-14, is marked by "flexibility and reasonable breadth rather than meticulous specificity" as is required to survive constitutional scrutiny. Id. Further, the Board is convinced that the term is sufficiently narrow as to avoid the dangers of any chilling effect on speech.

23. The Appellant's contention that the ordinance violates the "Equal Protection Clause" of the 5th and 14th Amendments is without merit, for Appellant has not presented any facts nor evidence that would support such a claim. The Board concludes that the City's enforcement of this ordinance passes constitutional muster under a rational basis review and strict scrutiny is not required since Appellant has failed to establish itself as a member of a protected class. See: *United States v. Carolene Products*, 304 U.S. 144 (1938).

24. The Board concludes that § 4-14 serves a substantial governmental purpose in that the ordinance as a whole is designed to "regulate sexually oriented businesses to promote the health, safety, morals and general welfare" of the citizens of North Charleston. It further creates reasonable and uniform regulations designed to prohibit the

"deliterious location and concentration" of sexually oriented businesses, while at the same time not impacting on free speech nor denying access by adults to sexually oriented materials. As such, § 4-14 complies with the guidelines established in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Additionally, the Board finds that a substantial governmental purpose is clearly served by enforcing an ordinance which prohibits a business from allowing acts of masturbation or other sexual conduct to occur in or on the premises of said business. The 1000 foot boundary bears a rational relationship to this substantial governmental purpose.

25. As for Appellant's contention that they will be zoned out of existence, the Board accepts the testimony of William Gore that other sites currently exist which would be suitable for sexually oriented businesses and therefore concludes that adequate alternative sites are available as required by *Renton*, supra, *Rothschild v. Richland County Board of Adjustment*, 420 S.E.2d 852 (S.C. 1992), and *Centaur, Inc. v. Richland County*, 392 S.E. 2d 165 (S.C. 1990). Further, the Board notes that in the absence of any evidence presented in support of its position, the Appellant waived this argument at the hearing of October 29, 1998.

26. As to the Appellant's contention that the Zoning Administrator refused to define in what particulars the Chateau allegedly violated the zoning ordinance, the Board finds this argument to be disingenuous. The record reflects that Appellant was prepared to concede that the Chateau was a sexually oriented business, indicating that Appellant was well aware that this would be an issue. Additionally, Appellant's Exhibit 3, which is a letter from the Deputy City Attorney to counsel for Appellant,

clearly advises that the Chateau appears to be in violation of "several interior design requirements" of § 4-14. The City presented evidence of poor lighting, lack of a clear line of sight from the manager's station to all parts of the premises, and the fact that more than one person at a time entered the viewing booths, all of which are violations of § 4-14. Even a cursory review of § 4-14 (n) would put a reasonable person on notice of the requirements of the ordinance, which could then easily be compared with the physical layout of the Chateau's interior design. In fact, Appellant introduced a diagram of the Chateau's interior layout, which the Board concludes was offered to rebut the City's contention of an interior design violation.

Appellant was clearly on notice that spatial separation would be an issue, for his own Exhibits 1, 2, 3, 6 and 7 all refer to the 1000 foot spatial separation boundary from churches and residential areas. Appellant's complaint that no notice was given regarding the spatial separation from a school has no impact on the spatial separation violation, for the Chateau clearly violates the distance requirements for the church and residential areas in question. As noted above, Exhibit R-1 prepared by Davis & Floyd contains a small map in the upper right hand corner designated "Location Map", which depicts the general area of the Chateau and surrounding streets, churches, and schools. Had Appellant cared to do so, Appellant could have had access to this same information from the City, for as Zoning Administrator Gore testified, the City maintains maps "that might be useful" to anyone attempting to find a suitable location for a sexually oriented business.

Appellant complains that insufficient notice of "bad acts" was given is undercut by Appellant's Exhibit 7, which reflects that counsel for Appellant was advised by the City Attorney prior to the hearing of October 29, 1998, of the fact that witnesses would be called to testify "concerning inappropriate conduct between patrons" in the business premises of the Chateau. A review of § 4-14 (j), (2), reveals that a business license may be revoked for a variety of reasons, including acts of sexual conduct, and the Board notes that Appellant presented no employee testimony to show that Appellant was operating in compliance with § 4-14. In fact, the only witness Appellant called was the absentee owner who had only visited the Chateau 5 times in the past 4 years.

The Board concludes that Appellant's argument as to lack of notice is meritless.

CONCLUSION

It is the conclusion of this Board that the Chateau Theatre is in violation of § 4-14 of the Ordinances of the City of North Charleston in that it is engaged in the sale of sexually oriented materials without a proper permit, allows and condones prohibited sexual activity on its premises, and violates the spatial separation requirements between a school, a residence, and a church. Additionally, this Board is satisfied that § 4-14, modeled closely after the language considered by the South Carolina Supreme Court in *Centaur* and *Rothschild*, supra, passes constitutional muster. Therefore, the decision of the Zoning Administrator, William Gore, is affirmed.

The Appellant shall have 48 hours to cease and desist all operations not consistent with all the provisions of § 4-14 applicable to its business.

/s/ David H. Bowers
Signature: David Bowers, Chairman

/s/ Alfred Harrison
Signature: Alfred Harrison

/s/ E. Lindsey Blanks
Signature: E. Lindsey Blanks

/s/ Anna M. Montgomery
Signature: Anna M. Montgomery

/s/ George Gomes
George Gomes

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON DUBAY ENTERPRISES d/b/a, THE CHATEAU THEATER, Appellant, v. BOARD OF ZONING APPEALS, CITY OF NORTH CHARLESTON, SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT No. 99-CP-10-0014 ORDER (Filed March 24, 1999)

SUMMARY

This matter came before me on the 16th Day of February, 1999, on the Chateau Theatre's appeal from the decision of the City of North Charleston Board of Zoning Appeals. Present on behalf of the Appellant were H. Louis Sirkin, Esquire and Thomas R. Goldstein, Esquire. The City was represented by J. Brady Hair, Esquire, and Derk Van Raalte, Esquire.

This Court has closely reviewed the record amassed below and finds no error. Review by the Circuit Court is appellate in nature. S.C. Code § 6-29-840. Fact findings are entitled to great deference and must be upheld unless completely erroneous or arbitrary. See *Sea Island Parkway Coalition, et. al. v. Beaufort County Board of Adjustment and Appeal*, 471 S.E.2d 142 (SC 1996). Based upon the record, I

find substantial evidence to support the factual conclusions of the Board of Zoning appeals.

The Board of Zoning Appeals is also correct as a matter of law. The Chateau Theatre attempted, by way of this appeal, to raise numerous issues. The record reflects that the Appellant waived a number of the speech related constitutional claims during its appearance before the Board of Zoning Appeals. Accordingly, those issues are not preserved for review. However, as will become clear from the opinion which follows, this Court has undertaken to comprehensively address the contentions of both parties on the merits in order to assure a complete determination. This Court has considered relevant authority including the Constitution, South Carolina Code, and associated judicial decisions, including, but not limited to *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986), *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (SC 1990), *Condor v. Board of Zoning Appeals, City of North Charleston*, 493 S.E.2d 342 (SC 1997). Consideration of the Chateau's appeal in light of established authorities leads this Court to the same inescapable conclusion as reached by the Board of Zoning Appeals below. Therefore, this Court endorses the opinion of the Board and affirms its result.

OPINION

This matter was properly before the Court, both in terms of subject matter and personal jurisdiction. The Appellant, Dubay Enterprises d/b/a Chateau Theatre (hereinafter "Chateau"), appealed the decision of the Board of Zoning Appeals for the City of North Charleston

(hereinafter "Board" or "BOZA") which held that its operation was noncompliant with Section 4-14 of the City of North Charleston Zoning Ordinance. Copy of Board's order attached as Exhibit A.

Sexually oriented businesses within the City of North Charleston are governed by Section 4-14 of the City of North Charleston's Zoning Ordinances. Section 4-14 provides in pertinent part:

> (1) Location of sexually oriented business.
>
> (1) All sexually oriented businesses shall be located within an M-1 or M-2 zoning district. A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of an M-1 or M-2 district.
>
> (2) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one thousand (1000) feet of:
>
> a. A church
>
> b. A boundary of any residential district
>
> c. A public park adjacent to a residential district
>
> d. The property line of a lot devoted to residential use.
>
> (3) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one mile of a public or private elementary or secondary school.

In determining how to properly measure the 1000 foot boundary, § 4-14(1) mandates that:

> (6) For the purpose of this section, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

In June, 1998, the Chateau was notified that the City believed its operations to be in violation of Section 4-14. Exhibits admitted before the Board show a series of letters then followed between various representatives of the City and representatives of the Chateau.

The Chateau was informed of its right to appeal the Zoning Administrator's decision to the Board.

The Appellant's appeal to the Board was commenced by the filing of a "Notice of Intent to Appeal" dated August 30, 1998. This notice expressed various exceptions to the Zoning Administrator's interpretation of § 4-14 (as applied to the Chateau), including:

> a. That Mr. Gore's letter of June 16, 1998, did not apply to the Chateau as the business was properly located in an industrial zone,[1]
>
> b. The definition of a "sexually oriented business" as set forth in Article IV, § 4-14 of the

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[1] This asserted error clearly ignored the existence of §§ 4-14(1)(2) and (1)(6) and, when viewed in light of these statutory provisions, would not have entitled the Chateau to relief.

> Zoning Regulations of the Code of Ordinances of the City of North Charleston, South Carolina, is unconstitutionally vague and overbroad on its face and as applied and, therefore, it violates the 1st, 5th, and 14th Amendments to the Constitution of the United States and the companion provisions of the South Carolina Constitution. Specifically, the definition:
>
> i. Gives unbridled discretion to the Zoning Administrator,
>
> ii. Violates the "Equal Protection" clause of the 5th and 14th Amendments to the Constitution of the United States and the companion provisions of the South Carolina Constitution
>
> c. The Zoning Ordinance fails to serve a substantial governmental purpose,
>
> d. The Zoning Ordinance literally zones out adult (sexually) oriented businesses from the City of North Charleston, and
>
> e. The Zoning Administrator refused to define in what particulars the Chateau allegedly violated the Zoning Ordinance.

No application for a variance was made within the Chateau's pleadings.

Despite identifying these issues in its Notice of Intent to Appeal, the Chateau waived many of these claims during its appearance before the Board on October 29, 1998.[2] Nonetheless, for prophylactic purposes the Board

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[2] Counsel for the Chateau, Thomas Goldstein, informed the Board that the City was in error to believe a number of issues would be presented at the hearing. "In fact, there's only one

addressed within its written order each of the issues listed within the Notice of Intent to Appeal. As will become evident, this Court has taken a similar approach.

The Board of Zoning Appeals considered the appeal in accord with established legal authority. Specifically, the Board analyzed the appeal by reference to the Constitution of the United States, Section 4-14 of the City's Zoning Ordinance, and applicable State and Federal judicial decisions.[3] The appeal hearing was conducted in accord with Section 7-2 of the Zoning Ordinances of the City of North Charleston, S.C. Code Ann. § 6-29-790, *et. seq.*, and the Rules of Professional Conduct, Rule 407, SCAR, Rule 1.8 (commentary to sub-section "k"). The Board's legal reasoning was set forth amply in its order to permit this Court opportunity for review.

This Court's role in reviewing the decisions of the Board of Zoning Appeals is appellate in nature and must be confined to the record amassed below. The Court should show deference to the findings of fact made by the Board in the same manner as would be appropriate for fact findings by a jury. S.C. Code Ann. 6-29-840, See *Sea Island Parkway Coalition, et. al. v. Beaufort County Board of*

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issue before the board tonight, and it's a very narrow issue. The only issue before the board is whether the Chateau Theatre runs afoul of the one thousand foot rule." Transcript of BOZA Hearing, P. 11, lines 7-10. See also Transcript of BOZA Hearing, Pp. 15-17.

[3] Though not expressly referenced within the Board's order, this Court takes notes that the speech provisions of the South Carolina Constitution have been interpreted to be co-extensive with the rights afforded under the United States Constitution. 1976-77 Op Atty Gen. No. 77-29, p34.

Adjustment and Appeal, 471 S.E.2d 142 (SC 1996) (noting that fact findings of the Board should be upheld unless arbitrary and completely erroneous). Further, this Court is restricted to correcting errors of law made by the Board. S.C. Code Ann. 6-29-840. Matters that were not presented to the Board may not be asserted before this Court for the first time on appeal. Similarly, this Court will neither accept nor consider additional evidence. *Id.*

This Court accepts the fact findings made by the Board which shall be incorporated by reference as if set forth fully herein. Ample evidence buttresses the Board's position. These fact findings, based upon hours of testimony and numerous exhibits, are neither arbitrary nor completely erroneous. Where the testimony of witnesses before the Board may have diverged, the Board was best positioned to assess such factors as witness demeanor, credibility, bias, and expertise. Much of the evidence was unrefuted. The Chateau conceded before this Court that it was a sexually oriented business. The remaining factual disputes largely pertained to such items as the interpretation of the City's zoning maps or the measurement of certain distances.[4] It certainly was not error to lend great weight to the testimony of the City Zoning Administrator's interpretation of the Zoning Map and zone boundaries shown thereon.[5] Thus, this Court is satisfied that the

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[4] Under close scrutiny, it is unclear precisely how divergent this testimony really was. The owner of the Chateau Theatre himself provided testimony that the distances involved were less than 1000'.

[5] The only contrary interpretation to be found in the record is within the testimony of Heston Dubay, owner of the Chateau. The Board was not arbitrary in concluding that the lay

fact findings below stand stalwart against the Chateau's attack.

This Court finds no error of law contained within the record before it. Intensive review satisfies the Court that the Board's order is well reasoned. However, due to the significance of the issues raised by both parties, this Court will definitively address all matters brought to the Court's attention.[6]

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testimony of Mr. Dubay was less weighty than the interpretation of the very zoning official charged with keeping and interpreting the maps.

[6] As previously mentioned, the Court believes that the Chateau Theatre waived a number of its constitutional arguments during the hearing below. The Court's treatment of those issues within this order does not change that conclusion Instead, these issues are addressed merely to provide a comprehensive review.

Issues may generally not be raised for the first time on appeal. See *Condor v. Board of Zoning Appeals, City of North Charleston*, 493 S.E.2d 342 (SC 1997) (Consider Fnt. 4 in which Supreme Court noted that an issue not presented to the Court below would not be considered for the first time on appeal), *Bailey v. Rutledge*, 354 S.E.2d 408 (SC App. 1987) (Court of Appeals declining to address an alleged error of the Board of Zoning Appeals where the issue was not first presented to the court below), *State v. Johnson*, 476 S.E.2d 681 (SC 1996) (contemporaneous objection required to preserve issue for appellate review). *State v. Torrence*, 406 S.E.2d 315 (S.C. 1991) (establishing the importance of contemporaneous objection in order to preserve issues for appellate review).

The transcript reveals that Appellant did not argue the "constitutionality of the ordinance" as a grounds for relief before the Board of Zoning Appeals. In fact, Counsel for the Chateau expressly told the Board that "[t]he only issue before the board is whether the Chateau Theatre runs afoul of the one

The Appellant's Speech Claims Are Controlled by *Renton*.

The United States Supreme Court, in decisions such as *Young v. American Mini Theaters*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters*, 475 U.S 41 (1986), resolved that local governments may legitimately regulate the harmful "secondary effects" associated with adult oriented businesses without invoking heightened First Amendment scrutiny. See also *Condor*, 493 S.E.2d 342, and *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (SC 1990). Such ordinances are to be treated as content neutral "time, place and manner restrictions" under the standards enunciated in *United States v. O'Brien*, 391 U.S. 367 (1968). *Renton*, 475 U.S 41. Under *O'Brien*, determination of content neutrality requires analysis of:

> (1) if [the ordinance] is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on . . . First Amendment freedoms is no greater than is essential to the furtherance of that interest.
>
> *O'Brien*, 391 U.S. at 377.

Even if content neutral "time place and manner" regulations have incidental impact upon speech, heightened

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thousand foot rule." BOZA transcript at P. 11. Lines 8-10. No significant argument was devoted to these constitutional speech issues. Where the tribunal below was denied the opportunity to consider an issue, this Court will not consider the issue on appeal. However, even if these issues were not waived, they would not entitled the Chateau to relief.

scrutiny is not appropriate. *Id.* Thus, where the *O'Brien* standards are met, analysis of a "secondary effects" ordinance does not invoke strict scrutiny and must be limited to: (1) the existence of a substantial governmental interest and (2) the existence of a reasonable alternative avenue for communication. *Renton,* 475 U.S. at 51.

Section 4-14 is a content neutral "time, place, and manner" regulation under O'Brien.[7]

Section 4-14 is a zoning ordinance and, as such, falls squarely within the constitutional powers of the City of North Charleston. "It is well within the constitutional power of a municipality to adopt zoning regulations that limit the areas in which adult entertainment enterprises may operate." *D.G. Restaurant Corp. v. City of Myrtle Beach,* 953 F.2d 140, 145 (4th Cir. 1991). Further, the protection of communities from the adverse secondary effects associated with adult oriented businesses is well recognized as a substantial governmental purpose unrelated to the message associated with free expression. See *Young v. American Mini Theaters,* 427 U.S. 50 (1976); *Renton,* 475 U.S. 41; *D.G. Restaurant,* 953 F.2d at 145,

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[7] The Chateau Theatre directed the Court's attention to *Ward v. Rock Against Racism,* ___ U.S. ___, 109 S.Ct. 2746 (1989), with the suggestion that this somehow agumented the traditional *O'Brien* and *FW/PBS* analysis and compelled a contrary result. This authority has already been interpreted by the South Carolina Supreme Court in *Centaur, Inc. v. Richland County,* 392 S.E.2d 165 (SC 1990). This Court concludes that, based upon *Centaur's* rationale, the *Ward* analysis does not alter the outcome.

Centaur, 392 S.E.2d 165 (SC 1990). Separating the community from adverse secondary effects through zoning is not a "pretext for suppressing expression, but rather [the city seeking] to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning." *Renton*, 475 U.S. at 53.

Section 4-14 survives review under *O'Brien*, *Renton*, and *Centaur*. Local governments have a substantial interest in protecting citizens from the secondary effects associated with adult oriented businesses. While the Appellant argues that the City lacks adequate factual experience upon which to regulate, the true impact of these businesses is well established. A City need not wait for tragedy to strike, but may instead rely upon the experiences and studies of other cities. See *Renton*, 475 U.S. at 51. Health, safety, and welfare concerns are constitutionally entrusted to state and local government. These legitimate governmental ends are unrelated to the content of the Chateau's speech.

"Zoning" is a legitimate "means" within the power of local government. "Zoning, as a definitional matter, is the regulation by a *local governmental entity*, of the use of land within a given community, and of the buildings and structures which may be located thereon. . . . " *K. Hope, Inc. v. Onslow County*, 911 F.Supp. 948, 954-55 (E.D.N.C. 1995)(emphasis added); see also *D.G. Restaurant*, 953 F.2d at 145. Even the specific method here employed, a 1000' spatial setback requirement, has been upheld. See *Renton*, 475 U.S 41 (1986), *Condor*, 493 S.E.2d 342 (SC 1997), and *Centaur*, 392 S.E.2d 165 (SC 1990). Thus, the dispersal

zoning scheme adopted by the City of North Charleston is a legitimate means of addressing secondary effects.[8]

Alternate avenues of speech remain open for sexually oriented businesses governed by Section 4-14. Admittedly, zoning may not be so restrictive as to effectively restrict access to speech or zone speech out of existence. See *American Mini Theaters*, 427 U.S. 50 (1976). Yet, the Courts have "never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Renton* 475 U.S. at 54. See also *D.G. Restaurant*, 953 F.2d at 147. The City of North Charleston has amply met the constitution's requirements.

The evidence demonstrates that sexually oriented businesses are not zoned out of existence by the City of North Charleston's zoning scheme.[9] The testimony below

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[8] This Court readily heeds the Supreme Court's admonition regarding the role of judicial review: "It is not [the court's] function to appraise the wisdom of [the city's] decision to require adult theaters to be separated. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *American Mini Theaters*, 427 U.S., at 71; *Renton* 475 U.S. at 53.

[9] The existence of compliant competitors amply refutes an additional ground advanced by the Appellant. The Chateau suggests that the requirements of Section 4-14 are "impossible to fulfill" and thus create a prior restraint. Complaint at Para. 9(iii). The requirements of Section 4-14 are self-evident. That businesses such as Generation X operate successfully under the ordinance demonstrate its reasonableness and viability.

established the existence of sites located to support sexually oriented business operations.[10] This Court also finds compelling the fact that competitors of the Chateau Theatre have been able to successfully locate and operate within the parameters of Section 4-14. Thus, this Court believes that adequate avenues for speech remain.

Adequate procedural safeguards exist

The rights of sexually oriented businesses are well protected by the procedural safeguards positioned within the City's ordinance as well as State law. The South Carolina Supreme Court in *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (S.C. 1990), reviewing an ordinance virtually identical to North Charleston's, concluded that the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), were satisfied. *Centaur*, 392 S.E.2d at 168-69. This Court can find nothing within the City of North Charleston's ordinance to warrant a contrary result.

Despite the Appellant's claims to the contrary, the Zoning Administrator lacks "unbridled discretion" as a matter of law. Section 4-14 encompasses thirteen (13)

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[10] Zoning Administrator Gore testified that suitable locations exist off Leeds Avenue near Duncan's Boat Harbor and in the vicinity of Dorchester Road. (Testimony of William Gore at *Chateau* hearing of October 29, 1998, Pages 136 and 147. Zoning Administrator Gore further explained that the City maintains maps in the Planning Department which could be reviewed by those persons wishing to discover a compliant location. *Id.* at 147.

pages of specific statutory language. The ordinance defines what constitutes an "adult bookstore" or "adult video store", and in so doing gives sexually oriented businesses fair notice of its application.[11] The ordinance also clearly articulates the method of measurement. See § 4-14(1)(6). The meaning of this statutory language within the State of South Carolina is well established by cases such as the previously mentioned *Centaur*,

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[11] *Adult bookstore* or *adult video store* means a commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:

a. Books, magazines, periodicals, or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas";

b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities." A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as a bookstore or adult video store. Such other business purposes will not serve to exempt such commercial establishment from being characterized as an adult bookstore or adult video store so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials which depict or describe "specified sexual activities" or "specified anatomical areas".

Section 4-14 Zoning Ordinance of the City of North Charleston.

Rothschild, and *Condor* decisions. Given a legal landscape littered with cases defining these terms, the Zoning Administrator has little discretion in determining to whom the ordinance applies. Further, the Plaintiff lack standing to raise such an argument in the instant case having previously admitted that "[t]he Chateau Theatre is a sexually-oriented business. There's no dispute about that. That's never been contested by anyone." (Transcript of Board of Zoning Appeals hearing October 29, 1998, Plaintiff's counsel Thomas Goldstein, Esquire, at P.15, 1.16-18.)

The Appellant also can not claim confusion as to the nature of the violations present in its case. The City's Code is a public document available to all who seek it. The Appellant was specifically informed in writing by City staff that (1) the Chateau was considered to be a sexually oriented business; (2) that the City believed that it violated the spatial separation requirement; and finally (3) that the City believed that the Chateau's floorplan might violate certain aspects of the ordinance. The Chateau's counsel was provided with a copy of the ordinance by the City in order to enable independent evaluation. It was the Chateau which then sought the appeal. As Appellant, the Chateau was empowered to raise the issues it believed significant. The City's role before the Board was simply to present ample evidence to rebut the arguments of the Appellant and construct a full and complete record on each of the statutory elements in case of appeal. The Appellant's claims of surprise and unfettered discretion are ill founded.

Prompt review of the Zoning Administrator's interpretations is assured under Title 6 of the South Carolina

Code. Due process requires that the party be given an opportunity for a hearing, the right to introduce evidence, and the right to confront witnesses. See *Armstrong v. Manzo*, 380 U.S. 545 (1965), *Baltimore and Ohio Railroad Company v. United States*, 298 U.S. 349 (1936), *Wolf v. McDonald*, 418 U.S. 539 (1974). These rights are afforded through the Board of Zoning Appeals process. Further, under S.C.Code § 6-29-800(B) an appeal to the Board stays all enforcement action, thus protecting and preserving the appellants right to challenge the City's position without penalty.

Prompt access to the state court system is also provided. The Fourth Circuit has clarified that the "prompt judicial review" contemplated by *FW/PBS* is a prompt decision on the merits. *Chesapeake B & M, Inc. v. Harford County, Maryland*, 58 F.3d 1005 (4th Cir. 1995). Previously, the Fourth Circuit in *11126 Baltimore Blvd. v. Prince Georges Co., Maryland*, 32 F.3d 109 (4th Cir. 1994), addressed what constituted a "prompt" resolution. The *11126 Baltimore Blvd* Court cited review periods of as much as 60 days as having previously passed constitutional review before invalidating the 110 day review schedule before it[12]. South Carolina provides for review within acceptable limits.

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[12] The *11126 Baltimore Blvd*, Court specifically noted the United States Supreme Court's opinion in *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). In *Thirty-Seven Photographs*, the Court considered both pre-hearing and post hearing delays. Significantly, the Court recognized that the delaying tactics not uncommon in litigation could not be used by a Defendant to invalidate a scheme of review. "No seizure or forfeiture will be invalidated for delay . . . where the claimant is responsible for extending either administrative action or

Prompt judicial review is assured by South Carolina's Code and Rules of Court. Rule 225(d) of the South Carolina Appellate Court Rules provides aggrieved parties with the opportunity to stay enforcement pending appeal by way of a Writ of Supersedeas. Though not automatic, expedited review of the stay is provided. Pursuant to SCAR 225(d)(6) it is possible for an aggrieved party to obtain an ex parte stay.[13] This opportunity to stay enforcement during appeal serves as an additional safeguard of prompt access to a judicial review of the merits.

State law requires expedited Circuit Court review of the merits following an appeal from a Board decision. Upon notification of the appeal from the Board, the Clerk of Court "shall give *immediate* notice of it to the secretary of the board and *within 30 days* from the time of the notice the board shall file with the clerk a certified copy of the proceedings held before the board of appeals. . . . " S.C.Code Ann. § 6-29-830(A) (emphasis added). *"At the next term* of the Circuit Court *or in chambers, upon ten days notice* to the parties, the presiding judge of the circuit

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judicial determination beyond the allowable time limits or where administrative or judicial proceedings are postponed pending the consideration of constitutional issues appropriate only for a three-judge court." *Thirty-Seven Photographs*, 402 U.S. at 374. In addressing the period for decision on the merits, the Court also provided guidance. Relying on legislative history, the Court concluded that prompt review was the Congressional intent and imposed a sixty (60) day requirement in order to allow the statute to pass constitutional muster. *Id.*

[13] See also S.C.Code Ann. 6-29-830(b) which states that "the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper."

court of the county shall proceed to hear and pass upon the appeal on the certified record of the board proceedings." S.C.Code Ann. § 6-29-840 (emphasis added). Thus, decision on the merits could be returned within forty (40) days under the laws of South Carolina and the Appellant has the opportunity to receive a stay pending appeal.[14] Prompt judicial review is assured.

Board of Zoning Appeals' Hearing On October 29, 1998, Satisfied Due Process.

The Chateau asserted a number of defects allegedly present at the October 29, 1999 hearing. Yet, the Appellant's alleged errors do not constitute a denial of Due Process.

Appellant first contends it was denied Due Process because of the Board issuing its ruling from the bench. As a preliminary matter, this Court's review of the transcript reveals no contemporaneous objection. Thus, the issue is not preserved for review. See *State v. Torrence*, 406 S.E.2d 315 (SC 1991) (establishing the necessity of contemporaneous objection, even in criminal cases). Even assuming the argument preserved, it would not entitled the Chateau to relief. The Appellant cited absolutely no authority establishing a limit or time requirement mandating that a decision-maker deliberate for a specific time period

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[14] The method of time calculation urged by Appellant is specious. Appellant urges that an additional thirty (30) days must be added to this timeframe since it has thirty (30) days in which to decide to appeal the Board. This Court is satisfied that the Appellant would use all deliberate speed in filing its Notice of Intent to Appeal. Since delay within this thirty (30) day time is exclusively within the control of the appellant, it will not be construed against the government.

before rendering a decision. The Board, like any other decision-maker, has the prerogative to rule from the bench or to reserve the matter for further consideration prior to judgment. The election to issue a ruling at the close of the case is not a constitutional error.

The Appellant next complains that the lack of attorneys sitting on the Board constituted a deprivation of Due Process. Again, no constitutional error exists. Appellant's claim, distilled to its essence, is that it failed to prevail because the decision maker was "too stupid" to understand its argument. That the constitution has rejected such arguments is amply demonstrated by its jury trial concept (applied even to complex litigation). Further, no constitutional or statutory provisions lawyers to sit on the Board. See S.C. Code Ann. § 6-29-780(B) (dictating the procedure for appointing BOZA members yet containing no requirement that the BOZA contain any attorneys.) No error is to be found in the composition of the Board.

The Appellant's next allegation that constitutional error resulted from the method of issuance of the written order also lacks merit. The Board ruled from the bench. It then directed that Counsel for the Board draft an order consistent with its ruling. This proposed order was reviewed and signed by the Board prior to issuance. There is no constitutional requirement that the Appellant be permitted review the order *drafted by the Board* prior to issuance.

The Appellant makes an additional Due Process claim with respect to the Board's choice of counsel. The South Carolina Supreme Court, by order effective

November 7, 1996, provided that Rule 1.8 "does not prevent one lawyer from prosecuting an administrative matter in which another lawyer in the same office serves as an advisor to the hearing body, as long as the lawyers do not communicate with one another or share information about the particular case." Order 96-21 Amending South Carolina Appellate Court Rules (See commentary to subsection k). The fact that the same governmental agency employs both the advisory lawyer and the prosecuting lawyer is not error. *Id.* The Appellant offered on appeal that Mr. DuTremble possessed, and had observed, the highest ethical standards in this case. The Chateau did not even assert the existence of actual prejudice.[15] Due Process was not denied.

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[15] Review of the transcript and the Board's order confirms that no prejudice inured to the Appellant as a result of the Mr. DuTremble's service as counsel. The Board took specific action in light of Appellant's objection in order to eliminate any possible concerns. "The Chairman ruled that Mr. DuTremble could only advise the Chairman on specific points of law and would not be allowed to question witnesses." BOZA Order, paragraph I. The Board further noted that the record was "devoid of any allegation of improper communications." *Id.* In order to fully dispel any possible illusions as to prejudice, the Board set forth in its order the only two instances in which its counsel was asked to render an opinion: (1) "The chairman asked for and received advice from Mr. DuTremble as to propriety of asking Mr. Dubay for his address" and (2) "[u]pon advice from Mr. DuTremble, the Chairman refused to allow the City to offer into evidence a document prepared by [a witness] reflecting his observations at the Chateau on July 16, 1998." (BOZA Transcript at 47, 77-79). The first issue drew no objection from the Appellant and the second was actually resolved in its favor.

Non-constitutional Claims

Appellant's claim of waiver/laches not supported by record

Laches, as defined by the South Carolina Supreme Court in *Byars v. Cherokee County*, 118 S.E.2d 324, 330 (SC 1961), is the "neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. . . . "[16] Moreover, in order for laches to apply, the circumstances must suggest that the inactive party abandoned or surrendered the right of action. *Id.*

There is no persuasive reason to invoke laches to thwart the public's interest in the enforcement of Section 4-14 against the Chateau Theater. The City of North Charleston passed Section 4-14 in 1990 and provided a two year amortization period. Since that amortization period expired in 1992 the City of North Charleston has consistently enforced the ordinance in courts up to and including the South Carolina Supreme Court. See *Condor*, 493 S.E.2d 342 (SC 1997), These litigation efforts were well chronicled in the media. Further, both Mr. Sirkin and Mr. Goldstein, now representing the Chateau Theater, participated in the previous litigation. This Court concludes, the Chateau had both actual and constructive notice that the City was not foregoing enforcement.

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[16] Note that while there is no longer an absolute bar to applying laches against governments, there has been a long historical tradition of disfavoring its use to undermine the public good. See cases such as *Farrow v. City of Charleston*, 168 SE 852 (SC 1933).

The Appellant is not entitled to "grandfathering".

The Appellant has no "legal non-conforming use" entitled to "grandfathering" since the City Council employed an amortization scheme. Section 4-14 provides with respect to sexually oriented businesses that "[t]he nonconforming use will be permitted to continue for a period not to exceed two years. . . . Further, the provisions of section 4-5, relating to non-conforming uses ["grandfathering"], *shall not* apply to businesses governed by the terms of this section."[17] City of North

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[17] The Appellant's initial pleadings suggested the specter of discriminatory intent within the City's election to employ amortization. This does [sic] bald allegation does not entitle the Chateau to relief. First, as the United States Supreme Court recently clarified in *Bogan v. Scott-Harris*, No. 96-1569 (U.S. Mar. 3, 1998), legislative motive is not a legitimate area of judicial review. The *Bogan* decision is particularly relevant to the Appellant's curious 42 U.S.C. § 1983 allegation. Second, no illicit content-based classification can be suggested since the City has chosen to deal with other non-speech areas by way of amortization as well. See City of North Charleston Zoning Ordinance § 9-71.1 (providing a one year amortization period for improperly located junk or salvage storage areas). Thus, the City's election to rely on amortization rather than "grand fathering" merely reflects an assessment that the continued toleration of particular type of harm presented by the secondary effects is somehow more offensive to surrounding areas than might be associated with certain other types of nonconforming uses. For example, a beauty salon operating within a residential neighborhood might fairly be said to pose a less immediate danger to surrounding children and residents than would a junkyard. The selection of an amortization scheme in lieu of "grand fathering" merely illustrates that the magnitude of dangers need not be identical for every type of zoning violation.

Charleston Zoning § 4-14(k)(8) (emphasis added). Amortization of a non-conforming use out of existence is a commonly accepted alternative to "grandfathering" in sexually oriented business regulation. See *Condor, Inc. v. City of North Charleston*, 493 S.E.2d 342 (SC 1997) (Court expressly noted City's use of a two year amortization period); *Centaur, Inc. v. Richland County*, 392 S.E.2d 165 (SC 1990); *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359 (S.D.Tex. 1986), aff'd, 837 F.2d 1268 (5th Cir. 1988) (6 months); *Castner v. City of Oakland*, 129 Cal.App.3d 94, 180 Cal.Rptr. 682 (1982) (1 year); *Cook County v. Renaissance Arcade & Bookstore*, 122 Ill.2d 123, 118 Ill. Dec. 618, 522 N.E.2d 73 (1988) (6 months); *Town of Islip v. Caviglia*, 540 N.E.2d 215 (NY 1989) (1.25 to 5.25 years); *PA Northwestern Distributors, Inc. v. Zoning Hearing Board*, 555 A.2d 1368 (PA 1989) (90 days);. *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153 (1978) (90 days); See also generally *Mugler v. Kansas*, 123 U.S. 623 (1887) (holding that a regulatory measure enacted under general police power does not per se constitute a taking.)

The City legitimately elected to employ an amortization scheme. Amortization schemes are commonly used in reference to sexually oriented businesses without effecting a "taking". The amortization period under the City's ordinance expired in 1992. Even giving the Chateau Theater the benefit of beginning the two (2) year amortization period upon its annexation into the City, the grace period has still terminated. The Appellant has had sufficient

time in which to recoup any possible investment and that is all that the law requires.[18]

The Chateau attempts to cloak its "grandfathering" argument in terms of "coming to the nuisance". The Appellant essentially contends that it can not be in violation with respect to the church property since it was built prior to construction of the church. This argument is specious. The ordinance was passed in 1990 with an amortization period which terminated in 1992. Accordingly, the effective date of the ordinance is the relevant time at which to consider the landscape inventory. Were the Chateau's strictly chronological method permitted to prevail, amortization schemes would lose all vitality. The entire reason amortization is provided in conjunction with an ordinance is that some previously permitted use becomes forbidden *as of the effective date of the ordinance*. Conducting the landscape inventory by date of construction rather than the effective date of the ordinance would essentially result in the very "grandfathering" the City Council sought to avoid. Here, both the church and the Chateau existed at the time Section 4-14 was enacted. Thus, the location of the church must be considered in determining required separations.[19]

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[18] The *Centaur* Court instructed that amortization periods are generally presumed reasonable and that the burden is upon the property owner to demonstrate that the private loss outweighs the public gain. There is no evidence in the record below to support such a determination in favor of the Chateau. The protection of children and the community are weighty interests.

[19] Even were the church ignored, the Chateau would still be in violation of the spatial separation requirements with respect

CONCLUSION

The Board of Zoning Appeals decision is affirmed. While the Appellant has asserted numerous points of alleged error, none entitle it to relief. References to First Amendment and Due Process deprivations have not been considered lightly. This Court concludes that Board of Zoning Appeals fully considered the constitutional, statutory, and common law issues surrounding application of Section 4-14 to the Chateau. This Court's review of the proceedings before the Board confirms that the Chateau has received all rights to which it was entitled. No error was committed by the Board and its result must be upheld.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

A) That the Order of the Board of Zoning Appeals is affirmed; and

B) That the Petitioner shall cease all activities inconsistent with Zoning Ordinance § 4-14 within forty-eight (48) hours of service of this order upon an attorney for the Appellant or an employee of the Chateau.

/s/ Gerald C. Smoak
Gerald C. Smoak
Judge of the
Ninth Judicial Circuit

This 23 day of March 1999.
North Charleston, South Carolina.

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to the school and the residences. There is no suggestion that the residences did not predate the Chateau's occupancy.

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C. P. & G. S.
By /s/ _____
DEPUTY CLERK

[LOGO]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

BRENDA F. SHEALEY
DEPUTY CLERK

(803) 734-1080
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October 10, 2001

Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger
& Goldstein PA
P.O. Box 71121
Charleston, SC 29415

RE: DuBay Enterprises, etc. v. City of North Charleston Board of Zoning Adjustment, et al.

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

October 10, 2001."

The remittitur in this matter is today being forwarded to the Clerk of Court for Charleston County.

Very truly yours,

/s/ Daniel E. Shearouse
CLERK

DES/djp

cc: H. Louis Sirkin, Esquire
Laura A. Abrams, Esquire
Derk B.K. Van Raalte, IV, Esquire
J. Brady Hari, Esquire

[LOGO]

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

BRENDA F. SHEALEY
DEPUTY CLERK

(803) 734-1080
FAX (803) 734-1499

October 10, 2001

REMITTITUR

The Honorable Julie J. Armstrong
PO Box 70219
N. Charleston, SC 29415-0219

RE: DuBay Enterprises v. Board of Zoning
99-CP-10-0014

Dear Ms. Armstrong:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/djp

Enclosure

cc: H. Louis Sirkin, Esquire
Laura A. Abrams, Esquire
Thomas R. Goldstein, Esquire
Derk B.K. Van Raalte, IV, Esquire
J. Brady Hair, Esquire

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	CASE NO. 99-CP-10-0014
DUBAY ENTERPRISES d/b/a CHATEAU THEATER, Appellant, vs. CITY OF NORTH CHARLESTON BOARD OF ZONING ADJUSTMENT & WILLIAM GORE, in his official capacity as zoning administrator, Defendants.	COMPLAINT (Appeal from zoning board – jury trial demanded) (Filed Jan. 5, 1999)

The plaintiff complaining of the defendants would allege and show as follows:

1. The plaintiff is a citizen and resident of the state of Maryland and owns real estate and other property in the County of Charleston, State of South Carolina.

2. The municipality, City of North Charleston, is a municipality organized and existing pursuant to the laws of the state of South Carolina, and exists within the counties of Charleston and Berkeley. The Board of Zoning Adjustment is an agency of the city of North Charleston, statutorily enacted to hear and decide issues of fact and law regarding zoning matters within the City of North

Charleston, provided that the Board provides minimum due process and equal protection for such applicants as appear before it.

3. The defendant, William Gore, is the zoning administrator for the City of North Charleston.

4. This court has jurisdiction over the parties and the subject matter herein by virtue of Title 5, Chapter 23 of the South Carolina Code of Laws, 1976, and as amended and pursuant to the Administrative Procedures Act as set forth in Title 1, Chapter 23 of the South Carolina Code of Laws.

5. This is an action authorized by law to redress deprivations under color of state law of rights, privileges, and immunities secured by the First and Fourteenth Amendments to the United States Constitution and for declaratory and injunctive (both temporary and permanently) relief.

6. The venue of this case is properly set in the Charleston County as the various acts complained of occurred within the [sic] Charleston County in the State of South Carolina.

7. The plaintiff operates a retail video and bookstore located on Dorchester Road in Charleston County, and it has operated from this location in excess of thirty years, prior to the existence of the City of North Charleston.

8. The City of North Charleston has enacted a zoning ordinance, Section 4-14, which purports to regulate to

specific areas of the City of North Charleston and businesses, which it classifies as "sexually-oriented businesses."

9. The Ordinance is unconstitutional on its face under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution and the corresponding sections under the South Carolina Constitution for the following reasons:

i. The Ordinance unconstitutionally "zones out" adult entertainment facilities from the City of North Charleston.

ii. The Ordinance fails to proved [sic] for the location of an adult entertainment facility as permitted use anywhere in the City of North Charleston.

iii. The Ordinance categorizes adult businesses as conditional uses only, which must meet stringent requirements that are impossible to fulfill, and these unreasonable restrictions create a prior restraint on the presentation and dissemination of constitutionally protected forms of expression by requiring persons who seek to present or disseminate such expression to first make application to do so. For example, the plaintiff in this case operates in a heavy industrialized zone, as required by the Ordinance, but the City still maintains that it is less than 1000 feet from a church by using a gerrymandered measurement, even though the Plaintiff's business existed prior to the location now occupied by a church and no such site exists that meets all of the requirements of the City's sexually oriented business ordinance.

iv. The City of North Charleston's sexually oriented business Ordinance is predicated upon purported findings and conclusions, which have never been established and for which no procedure exists under the Ordinance to challenge these findings and conclusions, without which the Ordinance must fail.

v. The determination of whether to allow or deny a use under the Ordinance is subject to the unbridled discretion of the Zoning Administration and the Board of Zoning Appeals, and neither the Zoning Administrator nor the Board of Zoning Appeals provides any mechanism for discovering what the allegations against the business owner are, what evidence exists, what charges must be met, what witnesses are going to be offered against the business owner, and there are no procedural safeguards or procedures which allow the business owner under attack minimum due process safeguards, and thus under the present system, the property owner under attack has no mechanism to prepare to meet the allegations against him.

vi. The Ordinance and the statutory scheme for appeal in South Carolina fail to provide prompt judicial review in the event that a use is denied by the Board of Zoning Appeals. The statutory appeals process in South Carolina calls for a *de novo* hearing only in the discretion of the Court, and it is incumbent for the aggrieved property owner to seek and obtain a stay on appeal from the Board of Zoning Appeals, even though the Board of Zoning Appeals has no procedural rules and no process to product minimum due process for the aggrieved property owner.

vii. The Ordinance and the statutory scheme governing appeals in South Carolina fail to provide for a stay of the decision of the Board of Zoning Appeals denying an application to operate during the pendency of the appeal to the Court of Common Pleas.

viii. The statutory scheme enacted by the City of North Charleston treats adult businesses differently than other non conforming entities, the sole distinction being based on content of material sold by the Plaintiff, which is a denial of equal protection and a restraint on the dissemination of adult material, which is protected by the First Amendment.

ix. The statutory scheme enacted by the City of North Charleston setting forth the procedure governing appeals from the unbridled discretion of the Zoning Administrator fails to provide minimum due process standards, and failed to afford the appellant a reasonable or fundamentally fair opportunity to appeal its case from the Zoning Administrator to the Board of Zoning Adjustment, including but not limited to the following particulars:

A. The City of North Charleston's attorneys prosecuted this action, before the Board of Adjustments despite one of the staff attorneys is acting as legal counsel for the Board and advised the Board on legal issues such as what evidence to receive and limited matters of cross examination, etc.

B. The City of North Charleston never provided reasonable notice to the appellant as to the issues to be heard by the Board of Zoning Adjustment, and until the actual hearing began, the appellant never was apprised of

what issues were before the Board other than the alleged set back requirements separating the appellant and a building allegedly used as a church (even though Section 1(9) of the Ordinance provides that an adult business does not become non conforming by the creation of a church within a 1000 thousand foot distance); (See letters from Bill Gore, dated June 16, 1998, a copy of which is attached hereto as Exhibit A, and a copy of a letter from Derk Van Raalte, dated August 12, 1998, a copy of which is attached hereto as Exhibit B, both incorporated by this reference. These letters constitute the only written notice afforded to the appellant as to what the issues before the Board would be.)

C. The Board, prior to voting, never considered the documentary evidence submitted by the appellant, but rather voted immediately following the closing statements of the attorneys involved in the case (see the entire transcript of hearing attached hereto as an exhibit, C, incorporated by this reference).

D. The Board is complied [sic] of new [sic] lawyers (with the exception of Lindsey Blanks, who cast the only vote to allow the Chateau to remain in operation) and thus, not only did the Board members lack the ability to consider the Appellants legal arguments, itself a declination of due process, but who relied on legal advice from the lawyer representing the City in making legal judgments.

E. In signing a written order requiring the Appellant to close in forty-eight hours, which would cause obvious irreparable harm to Appellant, the City never provided a copy of the proposed order to the Appellant for review and comment as required by South

Carolina Law and Fundamental Fairness. (See Section 1-23-340, S.C. Code, and Rule 5(a)(3), S.C. Rules of Civil Procedure.)

10. The Plaintiff would show further that the Ordinance and the statutory scheme for appeals to the Board of Zoning Adjustment vest such unbridled discretion in government officials over whether to permit or deny expressive activity that the Plaintiff may challenge the Ordinance facially without necessity of first applying for, and being denied, an application for a permit. The challenged Ordinance creates such a risk of delay that a facial challenge is appropriate because every application of the Ordinance creates an impermissible risk of suppression of ideas and their expression.

11. On June 16, 1998, the Zoning Administrator for the City of North Charleston, *sua sponte*, wrote a letter to the Plaintiff, a copy of which is attached hereto as Exhibit A, declaring the Plaintiff's use of the premises illegal. No notice of this action or any opportunity to be heard was afforded to the appellant.

12. Following the receipt of the above referenced notice, the Plaintiff applied for a hearing to the Board of Zoning Adjustment, and despite demands for clarification of the issues that he must meet in order to remain in business, the Plaintiff had no idea, other than the allegation of violating the 1000 foot set back rule, of the allegations against him, the evidence to be submitted against him, or what the issues and allegations against him were.

13. The Board of Zoning Adjustment does not function as an independent fact finding board, but rather acts as a rubber stamp approval for the Zoning Administrator

and fails to provide even minimum due process for aggrieved property owners such as the Appellant, and the Board, as an agency of the City of North Charleston, relies on the City of North Charleston to prosecute the case against the aggrieved property owner, and the Board receives legal advice and instruction from a lawyer provided by the City of North Charleston and completely fails to act as an independent fact finding body or in any way afford the aggrieved property owner any procedural or substantive safeguards and constitutionally guaranteed safeguards. The Board provides no system of procedural regulations or guidelines by which the applicant can discover the issues to be determined by the Board or prepare in any meaningful fashion for the allegations being made against the applicant.

FOR A SECOND CAUSE OF ACTION

(Waiver)

14. The appellant repeats the above allegations as if set forth here verbatim.

15. The Plaintiff has been in existence in excess of thirty years without interference from the City of North Charleston, and the City has waived any claims against Plaintiff by its failure to act.

16. The appellant has relied for years upon the City's acquiescence and invested considerable money and effort into making the business a viable economic entity.

17. The City, having granted the Plaintiff a business license for many years is estopped from claiming any violation of Ordinance 4-14.

FOR A THIRD CAUSE OF ACTION

(Laches)

18. The appellant repeats the above allegations as if set forth here verbatim.

19. The City of North Charleston has permitted the Plaintiff to operate since its inception as a municipality, and the Plaintiff has expended considerable sums in money and effort to run its business, and the City's unreasonable and unjustified delay in bringing an action against the Plaintiff is inequitable under these circumstances.

FOR A FOURTH CAUSE OF ACTION

(Plaintiff's standing as grandfathered entity)

20. The appellant repeats the above allegations as if set forth here verbatim.

21. The Plaintiff's business existed prior to the enactment of the City of North Charleston's zoning ordinance, and as a pre-existing, non-conforming use, is exempt from the application of the zoning ordinances.

FOR A FIFTH CAUSE OF ACTION

(Tile 42, Section 1983)

22. The appellant repeats the above allegations as if set forth here verbatim.

23. The Defendant's efforts to shut down the Plaintiff's business is a political act by which the Defendant seeks to suppress the dissemination of protected ideas solely because of their content and for no other reason and constitutes a deprivation of civil rights under color of law.

24. The Defendant has threatened the Plaintiff with criminal prosecution solely as a result of the Plaintiff's dissemination of adult material, which is a deprivation of civil rights under color of law.

WHEREFORE, the Plaintiff demands that the Court inquire into the matters herein and issue and order:

1. Granting a preliminary injunction restraining the Defendants, including their officers, agents, employees, representative, and all persons acting by, through, and for them, including but not limited to law enforcement officers, from enforcing, applying, and implementing Ordinance 4-14 and those sections of Title Six of the statutory laws of South Carolina.

2. Declaring Ordinance No. 4-14 unconstitutional on its face, or, in the alternative, remanding this case for determination mandating that the City provide minimum due process to ensure that the Plaintiff can understand the allegations with such compulsory process as is minimally required to insure that any administrative hearing comports with traditional notions of fair play.

3. That the Court declare the appellant's property a pre existing, nonconforming use and that Ordinance 4-14 as applied to the Appellant has been waived by the City of North Charleston.

4. Directing the Board of Adjustment to consider, on remand, if the Appellant's property qualifies for a variance from unjust application of Ordinance 4-14.

5. That the Plaintiff be awarded reasonable attorney's fees and costs pursuant to 42 U.S.C., Section 1988.

6. That it be awarded such other relief in law and equity that this Court deems just and proper under the premises.

Respectfully submitted,

/s/ Thomas R. Goldstein for
H. Louis Sirkin
SIRKIN, PINALES, MEZIBOV & SCHWARTZ
920 Fourth & Race Tower
105 West Fourth Street
Cincinnati, Ohio 45202-2776
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Federal I.D. No.

/s/ Thomas R. Goldstein
Thomas R. Goldstein
BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Post Office Box 71121
Charleston, South Carolina 29415-1121
(803) 554-4291
Federal I.D. No. 2132
ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
Dated: January ___, 1999

August 30, 1998

Mr. William B. Gore
Director of Planning and Management
City of North Charleston
P. O. Box 190016
N. Charleston, S. C. 29419

Clerk of Council,
Board of Zoning Appeals
City of North Charleston
4900 Lacrosse Ave.
N. Charleston, S. C. 29405

Dr. Mr. Gore and Clerk of Council,

Please accept this letter as further clarification of my counsel's earlier correspondence to your office. In as much as Mr. Gore's letter to me constitutes an official act of the City of North Charleston, we hereby appeal the decision of Mr. Gore that the Chateau Theater is improperly zoned. Please allow this letter to serve as an official Notice of Appeal of the decision of Mr. William Gore that the Chateau Theater is operating outside of compliance with any validly existing zoning ordinance.

The grounds for this appeal are as follows:

1. The letter is not applicable to the operation of the Chateau since that business is located in an industrial zone.

2. The definition of sexually oriented business as set fort [sic] in Article IV, Section 4-14 of the Zoning Regulations, of the Code of Ordinances of the City of North Charleston, South Carolina, is unconstitutionally vague and overbroad on its face and as applied, and, therefore, violates the First, Fifth, and Fourteenth Amendments to

the Constitution of the United States (and the companion provisions of the South Carolina Constitution). Specifically the definition:

a. gives unbridled discretion to the Building Official. See *Shuttlesworth vc.* [sic] *Brirmingham* [sic], 394 U.S. 147, 153, 89 S. Ct. 935, 940 (1969); *FW/PBS, Inc. d/b/a Paris Adult Bookstore II v. City of Dallas*, 475 U.S. 41, 106 S. Ct. 925 (1986)

b. violates the "equal protection" clause of the Fifth and Fourteenth Amendments to the Constitution of the United States (and the companion provisions of the South Carolina Constitution).

3. The Zoning Ordinance fails to serve a substantial governmental purpose. See *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986)

4. The Zoning Ordinance literally zones out adult (sexually) oriented business from the City of North Charleston, South Carolina. See *Renton v. Playtime, Id. Schad v. Burough* [sic] *of Mt. Ephram*, 425 U.S. 61, 101 S. Ct. 2167 (1981); *Walnut Properties v. City of Whittier*, 861 F.2d 1102 (9th Cir. 1988) *CLR Corp. v. Heinline*, 702 F.2d 637 (6th Cir.) 1983); see also *Woodall v. El Paso*, 950 F.2d 555 (5th Cir. 1992), as amended 4/21/92, U. S. App. LEXIS 7328; *Brookpark News & Books, Inc. v. Cleveland*, 66 Ohio App.3d 613, 585 N.E.2d 908 (1990).

5. The Zoning Administrator refuses to define in what particular [sic] The Chateau allegedly violates the Zoning Ordinance.

Please be advised that I have retained counsel to represent the corporation in this matter. My counsel are:

Thomas R. Goldstein
BELK, COBB, INFINGER
& GOLDSTEIN, P.A.
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Charleston, S. C.
29415-1121
(843) 554-4291

Nicholas Sottille
SOTILLE & HOPKINS
753 Coleman Blvd.
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(843) 884-1464

I would respectfully request that copies of all notices, etc. be sent to my counsel.

Sincerely,

/s/ Henry A. Dubay
Henry A. Dubay,
President, The Chateau, Inc.

IN THE CITY OF NORTH CHARLESTON

THE ZONING BOARD

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)
IN RE:	)
CHATEAU THEATRE, Appellant,	)
-versus-	)
CITY OF NORTH CHARLESTON Respondent.	)

DATE:	Thursday, October 29, 1998
TIME:	5:00 p.m.
LOCATION:	North Charleston City Hall 4900 LaCross Road North Charleston, South Carolina
REPORTED BY:	Eve Wilbanks, Registered Professional Reporter

THE CITY OF NORTH CHARLESTON ZONING BOARD:

DAVID H. BOWERS, CHAIRMAN
ALFRED HARRISON
GEORGE GOMES
E. LINDSAY BLANKS
ANN MONTGOMERY
DALE DuTREMBLE, ATTORNEY AT LAW

ZONING ADMINISTRATOR: William B. Gore

DEPUTY MUNICIPAL CLERK: DIANE GREER

APPEARANCES OF COUNSEL:

ON BEHALF OF THE APPELLANT:

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
By: THOMAS R. GOLDSTEIN
Attorney at Law
2344 Cosgrove Avenue
Charleston, SC 29405

ON BEHALF OF THE RESPONDENT:

CITY OF NORTH CHARLESTON LEGAL DEPARTMENT
By: J. BRADY HAIR
Attorney at Law
4900 LaCross Road
P.O. Box 190016
North Charleston, SC 29419
(803) 554-5700

CITY OF NORTH CHARLESTON LEGAL DEPARTMENT
BY: DERK VAN RAALTE, IV
Attorney at Law
4900 LaCross Road
P.O. Box 190016
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(803) 554-5700

* * *

[8] process along quickly.

THE CHAIRMAN: Mr. Goldstein?

MR. GOLDSTEIN: I'm not sure what the procedure is.

THE CHAIRMAN: What we normally do when we have these type of committee meetings – board meetings is we allow each party to make an opening statement. Then we normally allow the appellant to go first, which would be you, to present your case. And then we will allow the city to present its. And then if there are any – anyone in the audience, a member of the public would like to speak, we allow them to speak, and then we normally take our vote. And that's how we normally do it. Go ahead, sir.

MR. GOLDSTEIN: Prior to making an opening statement there are several important objections that I have to put on the record. First and foremost, I see that Mr. DuTremble is acting as counsel for the Board of Zoning Appeals. This presents a conflict of interest in the absolute highest order. There could not be a more egregious or higher conflict of interest. Because it is the legal department of the City of North Charleston that is bringing this case. It would be as if my law partner were acting as your legal counsel. If [9] that were the case, Mr. Brady – I'm sorry – Mr. Hair would object, and rightfully so. So it's – and it's highly improper and it's a denial of fundamental fairness to have a member of the prosecution team, as it were, sitting and acting as legal counsel for the board. So my first motion would be moving to exclude Mr. DuTremble from acting as counsel to the Board of Zoning Appeals.

THE CHAIRMAN: Well, Mr. DuTremble I believe is new to the city. Have you been working for a while?

MR. DuTREMBLE: About two months.

THE CHAIRMAN: About two months. I don't know what activity he's – you know, has done in this particular case. I being the chairman am allowed to rule on the evidence. I'll take your objection as so noted. But he does work for the city and he will keep the city's interest at heart, and that's what we're trying to do.

MR. HAIR: Mr. Chairman, could I just respond for the record to his objection because I think I can shed some light on it. Mr. Goldstein would be correct except that there has been a specific ruling in the South Carolina Supreme Court and an order that addresses this specific problem. [10] And that is the Supreme Court has said that it is okay for cities – municipalities and counties, governmental entities to use a member of their legal staff to advise the board as long as they don't act in any other capacity with this case. In other words, the rule is Mr. DuTremble can't advise the board tonight, draft an order for you all, and then follow it up to appeal at the circuit court or follow this case any further. He will not be doing that. Mr. DuTremble also cannot then prosecute them in a criminal proceeding, which he will not do. If that's necessary, someone else will do it. But the law is clear that cities don't have to go out and hire separate lawyers to come in and advise the board.

There's a specific rule and an order on point. I'm sure Tommy just isn't aware of it. But anyway, that's the city's position, and we'll provide you a copy of that order.

THE CHAIRMAN: We'll do it like this. The only questions that he'll be allowed to ask and answer are questions to me, ruling on a specific point of law. And then it will probably be just a conversation between he

and I. I won't allow him to ask any questions of any witnesses.

[11] MR. GOLDSTEIN: Of course my objection is noted for the record.

THE CHAIRMAN: So noted, sir.

MR. GOLDSTEIN: Mr. Hair is also incorrect. He says that there are a number of issues that are before the board tonight. In fact there's only one issue before the board tonight, and it's a very narrow issue. The only issue before the board is whether the Chateau Theatre runs afoul of the one thousand foot rule. And of course if it does, then this board can in its discretion grant a variance from that rule.

There are no other issues that are before this board. The hearing tonight is governed by the Administrative Procedures Act, specifically Section 1-23-320, which provides that prior to commencing a contested case such as the one presently before you the city is obligated to furnish a notice to me, as counsel for the appellant, informing me in writing of the time, place and nature of hearing, a statement of the legal authority and jurisdiction under which the hearing is to be held, a reference to the particular sections of the statutes and rules involved, and a short and plain statement of the matters asserted. If the agency or other party is [12] unable to state the matters in detail at the time the notice is served the initial notice may be limited to statements of the issues involved.

Now, that matter is, if I may hand out copies of letters which I have marked for the court reporter as Appellant's Exhibits 1 through 7 – and there are four –

MR. VAN RAALTE: Mr. Chairman, I'm going to object to the introduction of evidence by Mr. Goldstein for your consideration, and I object to it being marked by the court reporter unless he's got a – for laying a foundation in this case.

THE CHAIRMAN: Let me read through it and see what it says. Without reading it I don't know what he's trying to –

(Discussion off the record.)

THE CHAIRMAN: Mr. Goldstein, Derk, reading this over it just appears to be a bit of a tennis match between you two. I mean, you all were just kind of bouncing things back and forth. You're also asking me to rule on evidence, and I'm not a judge, but I do have the authority to rule on evidence. I don't see where this – you know, like you said, the issue before us tonight is whether or not the Chateau Theatre is a sexually-oriented [13] business. And if it is, does it fall within the distance reqirements of our zoning ordinance. And there's nothing in this that tells me one way or the other which they are.

So I'm going to have to disallow this as evidence. You know, I've read it over, and, like I said, it just appears to be a tennis match between the two parties. Now let's move on.

MR. VAN RAALTE: Thank you, Chairman.

MR. GOLDSTEIN: I'm not sure I understand the ruling. Is your ruling that the evidence will be limited to the thousand foot controversy?

THE CHAIRMAN: No. The ruling is – the issue before our – the board tonight is whether or not the Chateau Theatre is a sexually-oriented business as defined by our ordinances. And if it is such, does it fall – does it not meet the distance requirements in our ordinance? You know, actually, that decision was made by the zoning administrator. What we're here to do is to uphold his decision or deny his decision.

MR. GOLDSTEIN: Or issue a variance.

THE CHAIRMAN: Well, you haven't asked for a variance. To get a variance you have to apply for one. The hearing before us is your appeal of the [14] decision of the zoning administrator.

MR. GOLDSTEIN: Yes, sir.

THE CHAIRMAN: Yes. In fact, the letter from Mr. DuBay back to the city to Mr. Gore says nothing about an appeal. His grounds for his appeal are, one, that the letter is not applicable because he doesn't feel that the – it's not applicable because it's located in an industrial zone. The second item he brings up the thing that our zoning ordinances concerning sexually-oriented businesses are unconstitutionally vague and all of this, which we've seen before. In fact, they cite the same cases that have been cited before us before.

The third says that – you know, that our ordinance says it fails to serve a substantial governmental purpose. There's nothing in here about any kind of asking for a

variance. So in your appeal you kind of said that – you know, you're saying, We're not a sexually-oriented business. And even if we are, our ordinance doesn't apply to us – to you.

MR. GOLDSTEIN: I'm relying on the North Charleston Ordinance 7-1, Subsection E.

THE CHAIRMAN: Yes, sir.

MR. GOLDSTEIN: "Powers and Duties of the [15] Board of Appeals."

THE CHAIRMAN: And one of our duties is to uphold or deny the decisions of the city zoning administrator. Our city zoning administrator made the decision that the Chateau Theatre is a sexually-oriented business, and, as such, does not meet the distance requirements as set forth by our ordinance, which is why he wrote the letter. Mr. DuBay – he responded to that letter and that's why we're here tonight. There's nothing about any kind of variance. So we're not here to issue a variance. We're here to find out if the Chateau – what the Chateau Theatre is and if it is where it is. That's why we're here.

MR. GOLDSTEIN: Let me see if I can make this a shorter meeting. The Chateau Theatre is a sexually-oriented business. There's no dispute about that. That's never been contested by anyone. The material sold at the Chateau Theatre is adult material, and no one is allowed to enter the premises unless they show proper identification or are of such an age that they obviously do not – are not required to show it.

The front door to the establishment, as you'll see when you see the photographs, clearly [16] warn that the

material contained within the Chateau Theatre is adult material. Now, because we live in a free country, people are allowed to sell and people are allowed to buy adult material. Now, you know, there are a lot of people that don't like that, but in a free society that's –

THE CHAIRMAN: Sir, we're not going to discuss the constitution here. Whether or not people can sell or read X-rated or pornography is not the issue before us. The issue before us is whether or not it's a sexually-oriented business and does it fall within our zoning ordinances. Does it meet all the requirements of our zoning ordinance? That's the only thing we're going to rule on. We're not going to rule on anything else. So I understand where you're going and what you're doing, but I'm just telling you what we're going to do.

MR. GOLDSTEIN: Let me just state for the record that the only thing we're prepared to address are the matters set forth in Mr. Gore's letter, which is the document upon which we relied in bringing this matter before this board.

THE CHAIRMAN: The distance requirements?

MR. GOLDSTEIN: Correct. More specifically we're relying upon the distance [17] requirements as set forth in Mr. Gore's June 16th, 1998, letter. So having said that –

THE CHAIRMAN: May I ask you this?

MR. GOLDSTEIN: Yes.

THE CHAIRMAN: Are you finished with your opening statements and now you're presenting your case?

MR. GOLDSTEIN: Yes, sir.

THE CHAIRMAN: Okay.

MR. GOLDSTEIN: I'm ready to call my first witness. Heston DuBay.

HESTON DUBAY, SWORN.

DIRECT EXAMINATION

BY MR. GOLDSTEIN:

Q. You're Mr. Heston Dubay?

A. Yes, that's correct.

Q. Are you associated with DuBay Enterprises?

A. Yes, I am.

Q. You're part owner of that corporation?

A. Yes, I am.

Q. Do you know how long the Chateau Theatre has been in operation?

A. Approximately 30 years.

Q. When if first went into operation, was it in the City of North Charleston?

* * *

Exhibit A

Section 4-14. Sexually oriented businesses:

(a) *Purpose and intent of this section.* It is the purpose of this section to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the City of North Charleston. The provisions of this section have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials including sexually oriented materials. Similarly, it is not the intent or effect of this section to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent or effect of this section is [to] condone or legitimize the distribution of obscene materials.

(b) *Definitions.*

(1) *Adult arcade* means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five (5) or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) *Adult bookstore or adult video store* means a commercial establishment which, as one of its principal business purposes, offers for sale or rental for any form of consideration any one or more of the following:

a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities." A commercial establishment may have other principal business purposes that do not involve the offering for sale or rental of material depicting or describing "specified sexual activities" or "specified anatomical areas" and still be categorized as an adult bookstore or adult video store. Such other business purpose will not serve to exempt such commercial establishment from being categorized as an adult bookstore or adult video store so long as one of its principal business purposes is the offering for sale or rental for consideration the specified materials which depict or describe "specified sexual activities" or "specified anatomical areas."

(3) *Adult cabaret* means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

a. Persons who appear in a state of nudity; or

b. Live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

c. Films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the description of "specified sexual activities" or "specified anatomical areas."

(4) *Adult motel* means a hotel, motel or similar commercial establishment which:

a. Offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right-of-way which advertises the availability of this adult type of photographic reproductions; or

b. Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or

c. Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours.

(5) *Adult motion picture theater* means ~~a~~ commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified

sexual activities" or "specified anatomical areas."

(6) *Adult theater* means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) *Escort* means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(8) *Escort agency* means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.

(9) *Establishment* means and includes any of the following:

a. The opening or commencement of any sexually oriented business as a new business;

b. The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

c. The additions of any sexually oriented business to any other existing sexually oriented business; or

d. The relocation of any sexually oriented business.

(10) *Permittee* and/or *licensee* means a person in whose name a permit and/or license to operate

a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a permit and/or license.

(11) *Nude model studio* means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(12) *Nudity* or a *state of nudity* means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(13) *Person* means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(14) *Seminude* means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(15) *Sexual encounter center* means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

a. Physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

b. Activities between male and female persons and/or persons of the same sex where one or more of the persons is in a state of nudity or seminude.

(16) *Sexually oriented business* means an adult arcade, adult bookstore or adult video store,

adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(17) *Specified anatomical areas* means the male genitals in a state of sexual arousal and/or the vulva or more intimate parts of the female genitals.

(18) *Specified sexual activities* means and includes any of the following:

a. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

b. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

c. Masturbation, actual or simulated; or

d. Excretory functions as part of or in connection with any of the activities set forth in a. through c., above.

(19) *Substantial enlargement* of a sexually oriented business means the increase in floor areas occupied by the business by more than twenty-five (25) per cent, as the floor areas exist on February 22, 1990.

(20) *Transfer of ownership or control* of a sexually oriented business means and includes any of the following:

a. The sale, lease, or sublease of the business;

b. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

c. The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operations of law upon the death of the person possessing the ownership or control.

(21) *Introductory service.* Any person who, for financial consideration, offers to assist any person meet any other person for social or personal purposes not connected with or forming a part of another lawful business or professional activity.

(c) *Classification.* Sexually oriented businesses are classified as follows:

(1) Adult arcades;

(2) Adult bookstores or adult video stores;

(3) Adult cabarets;

(4) Adult motels;

(5) Adult motion picture theaters;

(6) Adult theaters;

(7) Escort agencies;

(8) Nude model studios; and

* * *

(2) An application for a permit and/or license must be made on a form provided by the North Charleston Building Department.

(3) The applicant must be qualified according to the provisions of this chapter [appendix] and the premises must be inspected and found to be in

compliance with the law by health, fire and building officials.

(4) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a permit and/or license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a ten (10) per cent or greater interest in the business must sign the application for a permit and/or license as applicant. If a corporation is listed as owner of a sexually oriented business or as the entity which wishes to operate such a business, each individual having a ten (10) per cent or greater interest in the corporation must sign the application for a permit and/or license as applicant.

(5) The fact that a person possesses other types of state or city permits and/or licenses does not exempt him from the requirement of obtaining a sexually oriented business permit and/or license.

(e) *Issuance of permit and/or license.* The North Charleston zoning administrator shall approve the issuance of a permit and/or license to an applicant within thirty (30) days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under eighteen (18) years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the permit

and/or license or has falsely answered a question or request for information on the applicant form.

(4) An applicant is residing with a person who has been denied a permit and/or license by the city to operate a sexually oriented business within the preceding twelve (12) months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding twelve (12) months.

(5) The premises to be used for the sexually oriented business have not been approved by health, fire and building officials as being in compliance with applicable laws and ordinances.

(6) The permit and/or license fee required by this section has not been paid.

(7) An applicant of the proposed establishment is in violation of or is not in compliance with any of the provisions of this section.

(8) The permit and/or license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The permit and/or license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

(f) *Fees.* The annual fee for a sexually oriented business permit and/or license is five hundred dollars ($500.00).

(g) *Inspection.*

(1) An applicant or permittee and/or licensee shall permit the zoning administrator and representatives of the police, health or fire departments or other city departments or agencies involved in code enforcement to inspect the premises of a sexually oriented business for the purpose of ensuring compliance with the law, at any time it is occupied or open for business.

(2) A person who operated a sexually oriented business or his agent or employee commits a misdemeanor if he refuses to permit such lawful inspection of the premises at any time it is occupied or open for business.

(h) *Expiration of permit and/or license.*

(1) Each permit and/or license shall expire one year from the date of issuance and may be renewed only by making application as provided in section 4-14(e). Application for renewal should be made at least thirty (30) days before the expiration date, and when made less than thirty (30) days before the expiration date, the expiration of the permit and/or license will not be affected.

(2) When the city zoning administrator denies renewal of a license, the applicant shall not be issued a permit and/or license for one year from the date of denial. If, subsequent to denial, the city zoning administrator finds that the basis for denial of the renewal permit and/or license has been corrected or abated, the applicant may be granted a permit and/or license if at least ninety (90) days have elapsed since the date denial became final.

(i) *Suspension.* The city zoning administrator shall suspend a permit and/or license for a period not to exceed thirty (30) days if he determines that a permittee and/or licensee or an employee of a permitee and/or licensee has:

(1) Violated or is not in compliance with any section of this ordinance.

(2) Engaged in excessive use of alcoholic beverages while on the sexually oriented business premises.

(3) Refused to allow an inspection of the sexually oriented business premises as authorized by this chapter [appendix].

(4) Knowingly permitted gambling by any person on the sexually oriented business premises.

(j) *Revocation.*

(1) The city zoning administrator shall revoke a permit and/or license if a cause of suspension in section 4-14(i) occurs and the permit and/or license has been suspended within the preceding twelve (12) months.

(2) The city zoning administrator shall revoke a permit and/or license if he determines that:

a. A permittee and/or licensee gave false or misleading information in the material submitted to the zoning [planning management] department during the application process;

b. A permittee and/or licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

c. A permittee and/or licensee or an employee has knowingly allowed prostitution on the premises;

d. A permittee and/or licensee or an employee knowingly operated the sexually oriented business during a period of time when the permittee's and/or licensee's permit and/or license was suspended;

e. A permittee and/or licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or other sexual conduct to occur in or on the permitted and/or licensed premises;

f. A permittee and/or licensee is delinquent in payment to the city or state for any taxes for fees past due.

(3) When the zoning administrator revokes a permit and/or license, the revocation shall continue for one year, and the permittee and/or licensee shall not be issued a sexually oriented permit and/or license for one year from the date revocation became effective. If, subsequent to revocation, the zoning administrator finds that the basis for the revocation has been corrected or abated, the applicant may be granted a permit and/or license if at least ninety (90) days have elapsed since the date the revocation became effective.

(k) *Transfer of permit and/or license.* A permittee and/or licensee shall not transfer his permit and/or license to another, nor shall a permittee and/or licensee operate a

sexually oriented business under the authority of a permit and/or license at any place other than the address designated in the application.

(l) *Location of sexually oriented business.*

(1) All sexually oriented businesses shall be located within an M-1 or M-2 zoning district. A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business outside of an M-1 or M-2 district.

(2) a person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one thousand (1,000) feet of:

a. A church;

b. A boundary of any residential district;

c. A public park adjacent to any residential district; or

d. The property line of a lot devoted to residential use.

(3) A person commits a misdemeanor if he operates or causes to be operated a sexually oriented business within one mile of a public or private elementary or secondary school.

(4) A person commits a misdemeanor if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within one thousand (1,000) feet of another sexually oriented business.

(5) A person commits a misdemeanor if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented

business in the same building, structure, or portion thereof, or the increase of floor areas of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(6) For the purpose of this section, measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(7) For purposes of subsection (l)(4) of this section, the distance between any two (2) sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(8) Any sexually oriented business lawfully operating on February 22, 1990, which has thereafter continuously lawfully operated, and which is in violation of subsection (l)(1) through (l)(5) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed two (2) years, unless sooner terminated for any reason or voluntarily discontinued for a period of one year or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two (2) or more sexually oriented businesses are within one thousand

(1,000) feet of one another and otherwise in a permissible location, this sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming. Further, the provisions of section 4-5, relating to nonconforming uses, shall not apply to businesses governed by the terms of this section.

(9) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business permit and/or license, of a church, public park, residential district or a residential lot within one thousand (1,000) feet of the sexually oriented business or within one mile of a public or private elementary or secondary school. This provision applies only to the renewal of a valid permit and/or license, and does not apply when an application for a permit and/or license is submitted after a permit and/or license has expired or has been revoked.

(m) *Additional regulations for adult motels.*

(1) Evidence that a sleeping room in a hotel, motel, or a similar commercial establishment has been rented and vacated two (2) or more times in a period of time that is less than ten (10) hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter [appendix].

(2) A person commits a misdemeanor if, as the person in control of a sleeping room in a hotel, motel, or similar commercial establishment that does not have a sexually oriented permit and/or

license, he rents or subrents a sleeping room to a person and, within ten (10) hours from the time the room is rented, he rents or subrents the same sleeping room again.

(3) For purposes of subsection (m)(2) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

(n) *Regulations pertaining to exhibition of sexually explicit films or videos.*

(1) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than one hundred fifty (150) square feet of floor space, a film, a video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements.

a. Upon application for a sexually oriented permit and/or license, the application shall be accompanied by a diagram of the premises showing a land thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be

oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six (6) inches. The zoning administrator may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

b. The application shall be sworn to be true and correct by the applicant.

c. No alteration in the configuration or location of a manager's station may be made without the prior approval of the zoning administrator or his designee.

d. It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

e. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two (2) or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an obstructed view of each area of the premises to which any patron is

permitted access for any purpose from at least one of the manager's stations.

f. It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in subsection (n)(1)e. of this section remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to subsection (n)(1)a. of this section.

g. No viewing room may be occupied by more than one person at any time.

h. The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one footcandle as measured at the floor level.

i. It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above is maintained at all times that any patron is present in the premises.

(2) A person having a duty under subsections (n)(1)a. through (n)(1)i. of this section commits a misdemeanor if he knowingly fails to fulfill that duty.

(o) *Exemptions.* It is a defense to prosecution under sections 4-14(e) and 4-14(h) that a person appearing in a state of nudity did so in a modeling class operated:

(1) By a proprietary school, licensed by the State of South Carolina; a college, junior collect or university supported entirely or partly by taxation; or

(2) By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation; and

(3) In a structure:

a. Which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

b. Where, in order to participate in a class, a student must enroll at least three (3) days in advance of the class; and

c. Where no more than one nude model is on the premises at any one time.

(p) *Injunction.* A person who operates or causes to be operated a sexually oriented business without a valid permit and/or license or in violation of section 4.14(l) of this ordinance is subject to a suit for injunction as well as prosecution for criminal violations. Such violations shall be punishable by a fine of two hundred dollars ($200.00) or thirty (30) days imprisonment.

(q) *Separability.* If any subsection or clause of this section shall be deemed to be unconstitutional or otherwise invalid, the validity of the remaining sections, subsections and clauses shall not be affected thereby.

(Ord. No. 1986-13, 3-27-86; Ord. No. 1990-20, 4-12-90; Ord. No. 1991-25, 6-27-92)

Sec. 7-2. Board of zoning appeals:

(a) *Establishment of zoning board of appeals:* A zoning board of appeals is hereby established. Said board shall consist of five (5) members, who shall be residents of North Charleston and shall be appointed by the mayor with approval of a majority of the city council for overlapping terms of three (3) years. Initial appointment shall be as follows: One (1) member for a term of three (3) years, two (2) members for a term of two (2) years, and two (2) members for a term of one (1) year. Any vacancy in the membership shall be filled for the unexpired term in the same manner as the initial appointment. Members shall serve without pay but may be reimbursed for any expenses incurred while representing the board.

(b) *Proceedings of the board of appeals:* The board of appeals shall elect a chairman and a vice-chairman from its members who shall serve for one (1) year or until reelected or until their successors are elected. The board shall appoint a secretary, who may be a city officer, an employee of the city, a member of the planning commission, or a member of the board of appeals. The board shall adopt rules and bylaws in accordance with the

provisions of this ordinance and of the General Statutes of South Carolina, 1962 Code of Laws, 1968 Cumulative Supplement, Vol. 3, Chapter 7.1, Article 3, Section 14-350 [1976 Code of Laws, section 6-7-310]. Meetings of the board shall be held at the call of the chairman and at such other times as the board may determine. All meetings of the board shall be open to the public.

(c) *Decisions of the board of appeals:* The concurring vote of three (3) members of the board of appeals shall be necessary to reverse any order, requirement, decision or determination of the zoning administrator or to decide in favor of the applicant on any matter upon which it is required to pass under this article or to affect any variation of this article. The board shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official action, all of which shall be immediately filed in the office of the board and shall be a public record. On all appeals, applications and matters brought before the board of appeals, the board shall inform in writing all the parties involved of its decision and the reasons therefor.

(d) *Appeals, hearing, and notice:* Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the city. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the zoning administrator and with the board of appeals notice of said appeal specifying the grounds thereof and accompanied by an application fee of seventy-five dollars ($75.00) to cover administrative costs (advertising). The zoning administrator shall forthwith transmit to the board all papers

constituting the record upon which the action appealed from was taken. An appeal stays all legal proceedings in furtherance of the action appealed from, unless the zoning administrator certifies to the board, after the notice of appeal shall have been filed with him, that the reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In such case, proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application, on notices to the officer from whom the appeal is taken, and on due cause shown. The board shall hold a hearing of the appeal or other matter referred to it, and give public notice thereof as well as due notice to the parties in interest, and decide the same within thirty-five (35) working days of formal filing of the appeal with the zoning administrator. Notice of the public hearing shall be published in a newspaper of general circulation in the city at least five (5) days in advance of the hearing date. At the hearing, any party may appear in person or by agent or by attorney.

Failure of the board of appeals to decide an appeal within thirty-five (35) working days of formal filing of the petition shall act to sustain the appeal.

(e) *Powers and duties of the board of appeals:* The board of appeals shall have the following powers and duties:

1. To hear and decide appeals where it is alleged there is error in any order, requirement, decision, or determination made by the zoning administrator in the enforcement of this act.
2. To authorize upon appeal in specific cases a variance from the terms of the article as will not be contrary to the public interest, where, owing to

special conditions, a literal enforcement of the provisions of the ordinance will in an individual case, result in unnecessary hardship, so that the spirit of the ordinance shall be observed, public safety and welfare secured, and substantial justice done. Such variance may be granted in such individual case of unnecessary hardship upon a finding by the board of appeals that:

there are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of size, shape, or topography; and

the application of the ordinance on this particular piece of property would create an unnecessary hardship; and

such conditions are peculiar to the particular piece of property involved; and

relief, if granted, would not cause substantial detriment to the public good or impair the purpose and intent of the ordinance or the comprehensive plan, provided, however, that no variance may be granted for a use of land or building or structure that is prohibited in a given district.

3. To decide on other matters where a decision of the board of appeals may be specifically required by the provisions of this ordinance. In exercising the above powers, the board of appeals may, in conformity with the provisions of this act, reverse or affirm, wholly or in part, or may modify the order, requirements, decisions, or determination, and to that end shall have all the powers of the zoning administrator from whom the appeal is taken and may issue or direct the issuance of a permit. The board, in the execution

of the duties for which appointed, may subpoena witnesses and in the case of contempt may certify such fact to the circuit court having jurisdiction.

(f) *Appeals from decisions of board of appeals:* Any person who may have a substantial interest in any decision of the board of appeals may appeal from any decision of the board to the circuit court in and for the County of Charleston by filing with the clerk of such court a petition in writing setting forth plainly, fully, and distinctly wherein such decision is contrary to law. Such appeal shall be filed within thirty (30) days after the decision of the board is rendered.

(Ord. No. 1995-86, 12-28-95)

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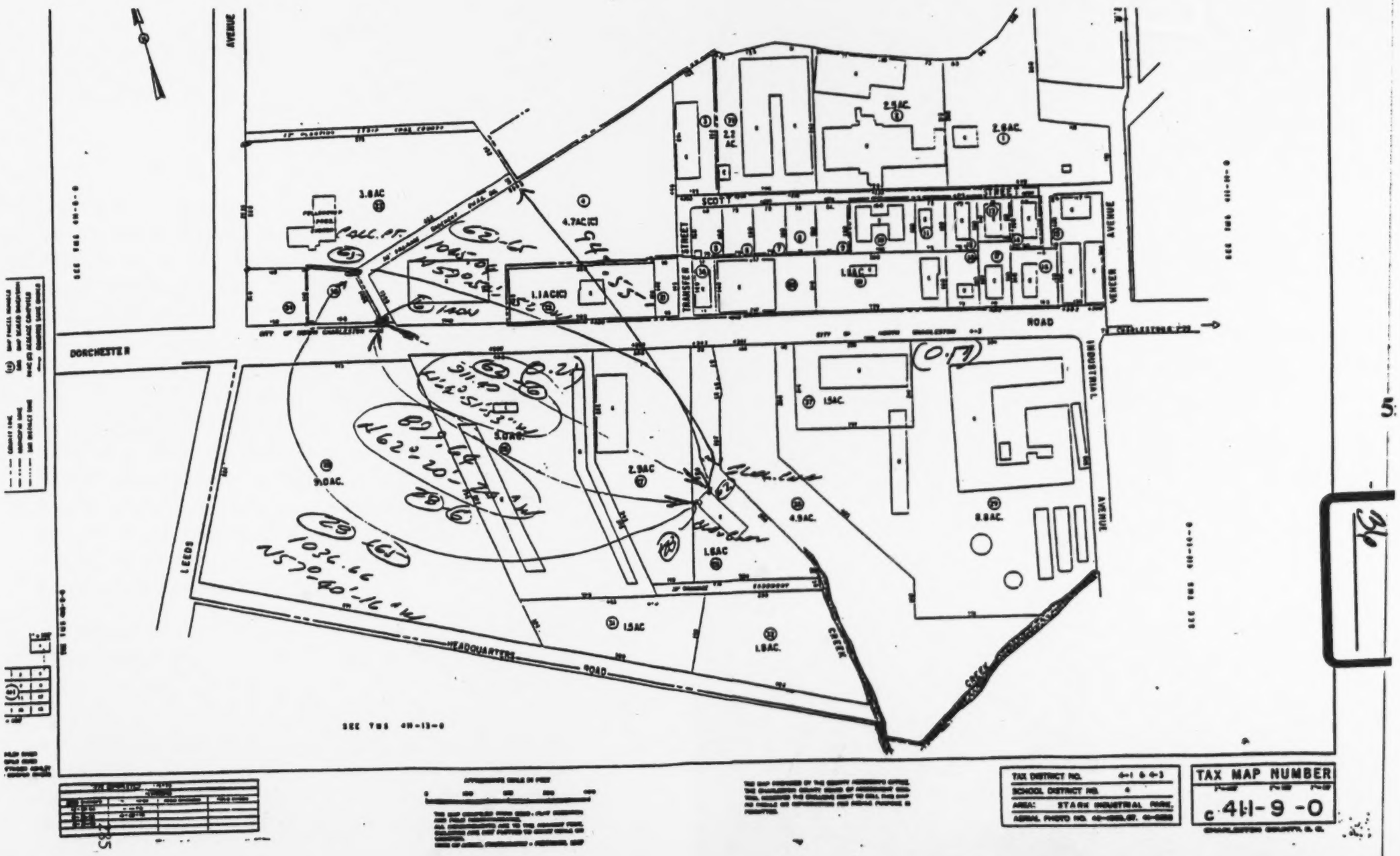

BEST AVAILABLE COPY

June 25, 1998

Mr. William B. Gore
Director of Planning and Management
City of North Charleston
P. O. Box 190016
N. Charleston, S. C. 29419

RE: Chateau Theater

Dear Mr. Gore,

Mr. Henry Dubay has turned over to me for response your letter of June 16, 1998. He is confused about your letter as am I after an inspection of the property. As you know, the Chateau Theater is located in an area that is zoned heavy industrial. From my inspection of the property, I can determine neither the location nor the measurements you are using to assert that the property is near residential or church property. The Chateau Theater is located in Stark Industrial Park, and prior to your letter of June 16, 1998, Mr. Dubay was not aware of any allegations by anyone that his business was not properly sited and properly conforming to all applicable, valid zoning laws. I would appreciate your willingness to meet with me on the property so that I could better understand the nature of your objections.

Moreover, as I am sure you are aware, the Chateau Theater has been in existence approximately twenty-five years, and as I said above, my client is not aware of any allegations concerning the location of the business. He also tells me that he never received any notice of the annexation of the property in to the City of North Charleston, and if you have evidence to the contrary, I would appreciate your sharing that with me.

Lastly, unless the state and federal constitutions have been repealed, I know of no authority by which you can demand a lawful business to close simply upon a bureaucratic fiat. My client believes that his business does conform to any zoning laws that may apply to him, and he certainly has no intention of closing his business simply because he receives a letter from you demanding that he do so.

As I said above, I would like to meet with you on the site so that we can determine how you are making your measurements and from what beginning point to what ending point.

I look forward to hearing from you.

Sincerely,

BELK, COBB, INFINGER &
GOLDSTEIN, P.A.
Thomas R. Goldstein

cc: Louis Sirkin
Henry Dubay